109-478

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 128.

OAKEY RANDALL, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED OCTOBER 16, 1880.

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1 In the circuit court of the United States for the district of West Virginia.

OAKLEY RANDALL *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY.	Trespass on the case.

TRANSCRIPT OF RECORD.

2 UNITED STATES OF AMERICA,
District of West Virginia, to wit:

At a circuit court of the United States for the fourth judicial circuit, in and for the district of West Virginia, continued and held at the city of Parkersburg, in said district, on Thursday, the 12th day of December, A. D. 1878. Present, the honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, and as such associate judge of the circuit court of the United States for the district of West Virginia. Among others the following proceedings were had:

OAKLEY RANDALL *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY.	In case.

This day came the plaintiff as well as the defendant, and upon motion of the plaintiff, and with the consent of the defendant leave is granted him to file an amended declaration in open court, which is accordingly done, to which the defendant has thirty days in which to demur or plead thereto.

The amended declaration referred to in the foregoing order is in the words and figures following, to wit:

3 *Amended declaration.*

In the circuit court of the United States, district of West Virginia, 4th judicial circuit.

Oakley Randall, the plaintiff in this suit, a citizen and resident of the State of West Virginia, complains of the Baltimore and Ohio Railroad Company, a corporation created by the laws of the State of Maryland, and as such a citizen and resident of said State, of a plea of trespass on the case.

1ST COUNT.—For that whereas the said defendant heretofore, to wit, on the day of March, A. D. 1874, and before and until and at the time of the plaintiff's entering into the service of the defendant, as hereinafter mentioned, and of the committing of the grievances hereinafter set forth, the defendant was, to wit, on the day and year last aforesaid, to wit, at the county of Taylor, and State of West Virginia, a corporation existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia; and the said defendant, on the day and year

last aforesaid, at said Taylor County aforesaid, being such corporation as aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and by its agents, officers, contractors, and servants was engaged in
operating said railroad from the city of Baltimore, in the State
4 of Maryland, to the cities of Wheeling and Parkersburg, in the
State of West Virginia, and through the town of Grafton, in the county of Taylor aforesaid; and this plaintiff, being a brakeman, entered into the service of the defendant upon the terms and conditions, amongst others, that the defendant should take and use all due reasonable and proper means and precautions in the selection of their agents, servants, and employees, and so construct engines, cars, and machinery, and their said road, tracks, switches, and switch balls, in order to prevent accident, damage, injuries, or unreasonable and unnecessary risk of damage from happening or occurring to plaintiff in the performance of his said duties as such servant of defendant, to wit, at the town of Grafton, county of Taylor aforesaid; and although the plaintiff did all things upon his part to be performed in a skillful, prudent, and faithful manner, to wit, on the day and year last aforesaid, to wit, at the town of Grafton, Taylor County, West Virginia, aforesaid, yet the said defendant did not, to wit, at the town of Grafton aforesaid, take or use proper means or precautions, and so construct their tracks at the town of Grafton, and county aforesaid, but altogether om*m*itted and failed so to do, and by reason thereof and the default and neglect of duty of the defendant in that respect, the
plaintiff was, while so employed as such servant as aforesaid, per-
5 forming the work of switching at the town and county aforesaid, as
a part of his duty as brakeman as aforesaid, in the night time of the day and year aforesaid, a train of cars from one track to another in the town of Grafton as aforesaid, and for that purpose to remain in great danger owing to the careless and negligent construction of the tracks of the said defendant, the same having been so carelessly and negligently constructed as aforesaid that it was impossible to perform the service the plaintiff was required to perform safely, and by reason of the negligence and default of the defendant the said tracks aforesaid remained constructed very unsafely and insecurely, and in such a defective condition and improper state as to render it dangerous to perform the work of switching the cars and engines of the said defendant at the town of Grafton aforesaid; all of which the defendant then and there knew, but whereof the plaintiff was wholly ignorant, and in consequence thereof whilst plaintiff was so engaged and employed, and whilst he was engaged in locking the switch under the direction of the said defendant's agent, who had authority from said defendant to give said orders to this plaintiff in his said employment, and whilst the plaintiff was so fulfilling his said duty, the said defendant negligently, causelessly, wrongfully, and unlawfully
propelled one of its locomotive engines, with the tender thereunto
6 attached, over and upon the plaintiff, and crushed, wounded, and
cut off one of the plaintiff's legs, and bruised his hips, thighs, arms, and chest, and caused him great and long continued bodily suffering in consequence thereof, and necessarily put the plaintiff to great outlay of money, to wit, the sum of five thousand dollars, in providing medical attendance, medicines, care, boarding, nursing, and purchasing an artifical limb to supply the place of the limb so crushed, wounded, and cut off by

the wrongful act of the defendant as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town and county aforesaid, in the State of West Virginia, to the damage of this plaintiff thirty thousand dollars ($30,000.00).

2D COUNT. And that before and until and at the time of the plaintiff's entering in the service of the defendant, as hereinafter mentioned, and of the committing of the grievances herein before set forth, the defendant was, to wit, on the day and year last aforesaid, to wit, at the county of Taylor, in the State of West Virginia, a corporation, existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia; and the said defendant, on the day and year last aforesaid,
7 at said Taylor County aforesaid, being such corporation as aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and, by its agents, officers, contractors, and servants, was engaged in operating said railroad from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia, and through the town of Grafton, in the county of Taylor aforesaid; and the said plaintiff, being a brakeman, entered into the service of the said defendant, and by reason thereof it became the duty of the said defendant to take and use all reasonable and proper means and precautions in the selection of its agents, servants, and employees, and so construct its switches, in order order to prevent accident, danger, injuries, or unreasonable or unnecessary risk of danger from happening or occurring to plaintiff in the performance of his duty as such servant of defendant, to wit, at the town of Grafton, Taylor County, as aforesaid; and although the plaintiff did all things upon his part to be performed in a skillfull, prudent, and faithful manner, to wit, on the day and year last aforesaid, to wit, at the town of Grafton, Taylor County, State of West Virginia aforesaid, yet the said defendant did not, to wit, at the town of Grafton aforesaid, take or use proper means of precaution and so construct their switches as
8 to prevent accidents, injuries, or unreasonable or unnecessary risk of injury from happening or occurring to this plaintiff in the performance of his duty as such servant of defendant, but altogether omitted so to do, and by reason thereof in that respect the plaintiff was, while so employed as such servant as aforesaid, performing the work of switching, at the town of Grafton aforesaid, as a part of his duty as brakesman as aforesaid, in the night time of the day and year aforesaid, a train of cars from one track to another, in the town of Grafton as aforesaid, and for that purpose to remain in great danger, owing to its careless and negligent construction of the switches of the defendant at the town of Grafton aforesaid, the same having been so carelessly and negligently constructed that it was impossible to perform the service the plaintiff was required to perform safely by reason of the negligence and default of the defendant; the said switches remained constructed very unsafely and insecurely and in such a defective condition and improper state as to render it dangerous to perform the work of switching the cars and engines at the switches aforesaid; all of which the defendant then and there knew, but whereof the plaintiff was wholly ignorant, and in consequence thereof, whilst plaintiff
9 was so engaged and employed, and whilst he was engaged in switching a train of cars belonging to the defendants as aforesaid, under

the direction of the defendant's said agents, who had authority from said defendant to give such orders to this plaintiff in his said employment, and whilst the said plaintiff was fulfilling his said duty the said defendant negligently, carelessly, and unlawfully propelled one of its locomotive engines, with a tender thereunto attached, over and upon the plaintiff, and crushed, wounded, and cut off one of the plaintiff's legs, and bruised his hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put plaintiff to great outlay of money, to wit, the sum of five thousand dollars, in providing the medical attendance, medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful acts of the defendants as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town of Grafton and county aforesaid, in the State of West Virginia, to the damage of this plaintiff thirty thousand dollars ($30,000.00).

3D COUNT.—And that before and until and at the time of the plaintiff's entering into the service of the defendant as hereinafter mentioned, and of the committing of the grievances hereinafter set forth, the
10 defendant was, to wit, on the day and year last aforesaid, to wit, at the county of Taylor, in the State of West Virginia, a corporation existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia, under and by virtue of the laws of the State of West Virginia; and the said defendant on the day and year last aforesaid, being such corporation as aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and by its agents, officers, contractors, and servants was engaged in operating said railroad from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia, and through the town of Grafton, in the county of Taylor, aforesaid; and the said plaintiff, being a brakesman, entered into the service of the said defendant, and by reason thereof it became the duty of the said defendant to take and use all reasonable and proper means and precautions in the selection of its agents, servants, and employees and so construct its engines and equip the same with bells and signals in order to prevent accident, damage, injuries, or unreasonable or unnecessary risk of damage from happening or occurring to plaintiff in the performance of his duty as such servant of
11 defendant, to wit, at the town of Grafton, Taylor County, as aforesaid; and although the plaintiff did all things upon his part to be performed in a skillful, prudent, and faithful manner, to wit, on the day and year last aforesaid, to wit, at the town of Grafton, Taylor County, West Virginia, afore said; yet the said defendant did not, to wit, at the town of Grafton aforesaid, take or use proper means or precautions, and so construct its said engines, and equip the same with bells and signals so as to prevent accident, injuries, or unreasonable or unnecessary risk of injury from happening, or occurring, to this plaintiff in the performance of his duty as such servant of said defendant, but altogether omitted so to do, and by reason thereof in that respect the plaintiff was, while so employed as such servant as aforesaid, performing the work of switching, at the town of Grafton aforesaid, as a part of his duty as brakesman as aforesaid, in the night-time of the day and year aforesaid, a train of cars from one of said defendant's tracks to another in the town of Grafton as aforesaid, and for that purpose to re-

main in great danger, owing to the careless and negligent construction of its said engines and equipment of the same with bells and signals as aforesaid, at the town of Grafton aforesaid, the same having been so carelessly and negligently constructed and equipped that it was impossible
12 to perform the service the plaintiff was required to perform safely; and by reason of the negligence and the default of the defendant, the said engines remained constructed and equipped very unsafely and in such a defective condition and improper state as to render it dangerous to perform the work of switching the cars and engines at the switches aforesaid, all of which the defendant then and there knew, but whereof the plaintiff was wholly ignorant; and in consequence thereof whilst plaintiff was so engaged and employed, and whilst he was engaged in switching a train of cars belonging to the defendant as aforesaid, under the direction of the defendant's said agent, who has authority from said defendant to give such orders to this plaintiff in his said employment, and whilst the said plaintiff was so fulfilling his said duty, the said defendant negligently, carelessly, and unlawfully propelled one of its locomotive engines with a tender thereunto attached, over and upon the plaintiff, and crushed, wounded, and cut off one of the plaintiff's legs, and bruised his hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put plaintiff to great outlay of money, to
13 wit, the sum of five thousand dollars in providing the medical attendance, medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful acts of the defendant as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town of Grafton and county aforesaid, in the State of West Virginia, to the damage of this plaintiff thirty thousand dollars ($30,000.00).

4TH COUNT.—And that before and until at the time of the plaintiff's entering into the service of the defendant as hereinafter mentioned, and of the committing of the grievances hereinafter set forth, the defendant was, to wit, on the day and year last beforementioned, to wit, at the county of Taylor, and State of West Virginia, a corporation existing and organized under and by virtue of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia, and the said defendant, on the day and year last aforementioned, at said Taylor County aforesaid, being such corporation as aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and by its agents, officers, contractors, and servants was engaged in operating said railroad from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia,
14 and through the town of Grafton, in the county of Taylor aforesaid; and the said plaintiff, being a brakesman, entered into the service of the said defendant, by means whereof it became and was the duty of the said defendant to take and use all due, reasonable, and proper means and precautions in the selection of its agents, servants, and employees, and so construct the switch balls used to open and close switches upon their said track in order to prevent accident, damage, injuries, or unreasonable or unnecessary risk of danger from happening or occurring to this plaintiff in the performance of his duty as such servant of defendant, to wit, at the town of Grafton, county of Taylor aforesaid; and

although the plaintiff done all things on his part to be performed in a skillful, prudent, and faithful manner, to wit, on the day and year last aforesaid, to wit, at the town of Grafton, Taylor County, West Virginia, aforesaid, yet the said defendant did not, to wit, at the town of Grafton aforesaid, take or use proper means or precautions and so construct the switch balls used to open close switches upon its said tracks, but altogether ommitted and failed so to do, and by reason thereof and of the fault and neglect of the defendant in that respect the plaintiff, while so employed as such servant aforesaid, performing the work of switching, at the
15 town of Grafton aforesaid, as a part of his duty as brakesman aforesaid, in the night time of the day and year aforesaid, a train of cars from one of the defendant's tracks to another in the town of Grafton aforesaid, and for that purpose to remain in great danger owing to the careless and negligent construction of a switch-ball of the defendant used to open and close a switch upon its said track, the same having been so carelessly and negligently constructed that it was impossible to perform the service which the plaintiff was required to perform safely, and by reason of the negligence and default of the defendant the said switch-ball used to open and close the switch aforesaid remain constructed insecurely and in such a defective condition as to render it dangerous to perform the work of switching the cars and engines at the switches aforesaid, all of which the defendant then and there knew, but whereof the plaintiff was ignorant, and in consequence whereof, whilst plaintiff was so engaged and employed as aforesaid, and whilst so engaged in locking the switch and the switch-ball aforesaid, under the direction of the defendant's said agents who had authority from said defendants to give such orders to this plaintiff in his said employment, and whilst the said plaintiff was so ful-
16 filling his said duty, the said defendant negligently, carelessly, wrongfully, and unlawfully propelled one of its locomotive engines with a tender thereto attached over and upon the plaintiff, and crushed, wounded, and cut off one of plaintiff's legs, and bruised his hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put the plaintiff to great outlay of money, to wit, the sum of five thousand dollars, in providing medical attendance, medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful act of the defendant as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town and county aforesaid, in the State of West Virginia, to the damage of this plaintiff thirty thousand dollars ($30,000.00).

5TH COUNT.—And that whereas also the said defendant heretofore, to wit, on the day of March, in the year one thousand eight hundred and seventy-four, at the county of Marion, in the State of West Virginia, was a corporation existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia; and the said
17 defendant was on the said day of March, A. D. 1874, the owner and proprietor of the Baltimore and Ohio Railroad, and by its office's, agents, and servants was engaged in operating said railroad, extending from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia, and through the town of Grafton, in the county of Taylor, in said State of West Virgi-

nia, and on the day and year aforesaid the plaintiff was in the service and employ of the said Baltimore and Ohio Railroad Company, assisting in the running of its trains of cars, and under said defendants orders and directions was performing the duties of brakeman upon the cars of said company; and whilst plaintiff was so engaged as aforesaid in performing the duties of brakeman, and was in the exercise of due care and diligence in and about said employment, acting under the orders of the agent of said defendant, to wit, one Bud Jasper, his superior in said employment appointed by *by* said defendant to give him orders in this respect, and without any fault or negligence upon his part, to wit, on the day and year aforesaid, at Grafton, in the county of Taylor, and State of West Virginia, the said the Baltimore and Ohio Railroad Company by another of its
18 agents and servants, to wit, one Taylor Groves, who was at the time unskillful and negligent, and totally unfit to perform the business and employment he was engaged by said company to perform, and who was engaged in a service for said company other and different from the service in which this plaintiff was engaged, and whose negligence, unskillfulness, and unfitness in this respect was known to the defendant, and of which this plaintiff was wholly ignorant, negligently, carelessly, wrongfully, and unlawfully propelled one of its locomotive engines, to wit, engine number 329, with a tender thereto attached, over and upon the plaintiff, and crushed, wounded, and cut off one of plaintiff's legs, and bruised his hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put the plaintiff to great outlay of money, to wit, the sum of five thousand dollars, in providing medical attendance, medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful acts of the defendant as aforesaid, *as* and other wrongs to the plaintiff then and there did,
19 to wit, at the town and county aforesaid, in the State of West Virginia, to the damage of the plaintiff thirty thousand dollars.

SIXTH COUNT.—And at, before, and until and at the time of the plaintiff's entering into the service of the defendant, as hereinafter mentioned, and of the committing of the grievances herein before set forth, the defendant was, to wit, at the county of Taylor, in the State of West Virginia, a corporation existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia; and the said defendant, on the day and year last aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and by its agents, office's, contractors, and servants was engaged in operating said railroad from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia, and through the town of Grafton, in the county of Taylor aforesaid; and on the day and year aforesaid the plaintiff was in the employ and service of the said The Baltimore and Ohio Railroad Company, assisting in the running of its trains of cars, and under the said defendant's orders and directions was performing the duty of brakeman upon the cars of said company, and whilst plaintiff was
20 so engaged, as aforesaid, in performing the duties of brakeman, and was in the exercise of due care and dilligence in and about said employment, acting under the orders of the agents of said defendant, to

wit, one Bud Jasper , his superior in said employment, appointed by said defendant to give him orders in this respect, and without any fault or negligence upon this plaintiff's part, to wit, on the day and year last aforesaid, at Grafton, in the county of Taylor, and State of West Virginia, at a point in said town of Grafton where said defendant's track passes along and crosses over a part of said town of Grafton used as a public crossing and highway, the said Baltimore and Ohio Railroad Company, by another of its servants and agents, to wit, one Taylor Groves, who was at the time unskillful and negligent, and totally unfit to perform the business and employment he was engaged by said company to perform, and who was engaged in a service for said company other and different from the service in which this plaintiff was engaged, and whose negligence and unskillfulness and unfitness in this respect was known to the defendant, and

21 of which this plaintiff was wholly ignorant, negligently, carelessly, wrongfully, and unlawfully, and without sounding any whistle or ringing any bell or other signal at or within a distance of sixty rods from such public crossing as aforesaid, as it was required by the laws of the State of West Virginia then in force at the time of the committing of the grievances by the defendant in this count complained of by this plaintiff, propelled one of its locomotive engines, to wit, engine numbered three hundred and twenty-nine (329), with a tender thereunto attached, over and upon the plaintiff, and crushed, wounded, and cut off one of plaintiff's legs and bruised his hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put the plaintiff to great outlay of money, to wit, the sum of five thousand dollars, in providing medical attendance and medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful acts of the defendants as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town and county aforesaid, in the State of West Virginia, to the damage of the plaintiff thirty thousand dollars ($30,000.00).

SEVENTH COUNT.—And that before and until and at the time of

21 plaintiff's entering into the service of the defendant, as hereinafter mentioned, and of the committing of the grievances hereinafter set forth, the defendant was, to wit, on the day and year last aforesaid, to wit, at the county of Taylor and State of West Virginia, a corporation existing and organized under and by virtue of the laws of the State of Maryland, and doing business in the State of West Virginia by virtue of the laws of the State of West Virginia; and the said defendant on the day and year last aforesaid, at said Taylor County aforesaid, being such corporation as aforesaid, was the owner and proprietor of the Baltimore and Ohio Railroad, and by its agents, office's, contractors, and servants was engaged in operating said railroad from the city of Baltimore, in the State of Maryland, to the cities of Wheeling and Parkersburg, in the State of West Virginia, and through the town of Grafton, in the county of Taylor aforesaid; and the said plaintiff being a brakeman, entered into the service of the said defendant, by means whereof it became and was the duty of said defendant to take and use all due and reasonable and proper means and precautions in the selection of its agents, servants, and employees, in

23 order to prevent accident, damage, injuries, or unreasonable or unnecessary risk of damage from happening or occurring to this plaintiff

in the performance of his duty as such servant of defendant, to wit, at the town of Grafton, county of Taylor aforesaid; and although the plaintiff did all things on his part to be performed in a skillful, prudent, and faithful manner, to wit, on the day and year last aforesaid, to wit, at the town of Grafton, county of Taylor and State of West Virginia aforesaid, yet the said defendant did not, to wit, at the town of Grafton aforesaid, take or use proper means or precautions in the selection and employing of its agents, servants, and employees, but altogether omitted and failed so to do, and by means thereof and the default and neglect of the defendant in that respect the plaintiff was, while so employed as such servant aforesaid, performing the work of switching, at the town of Grafton aforesaid as a part of his duty as brakeman aforesaid, in the night time of the day and year aforesaid, a train of cars from one of the defendant's tracks to another in the town of Grafton aforesaid, and for that purpose to remain in great danger, owing to the careless and negligent employment of unskillful and negligent servants and agents of defendants, to wit, one Taylor Groves, who was at the time unskillful and negligent and
24 totally unfit to perform the business and employment he was engaged by said defendant to perform, so that it was impossible to perform the service which this plaintiff was required to perform safely, and by reason of the negligence and default of the defendant in employing an unskillful and negligent servant as aforesaid, rendered it dangerous to perform the work of switching the cars and engines at the switch aforesaid, all of which the defendant then and there knew, but whereof the plaintiff was ignorant and in consequence thereof; whilst plaintiff was so engaged in locking the switch and switch-ball aforesaid under the directions of the defendant's said agents, one Bud Jasper, who had authority from said defendants to give said orders to this plaintiff in his said employment, and whilst the said plaintiff was so fulfilling his said duty, the said defendant negligently, carelessly, wrongfully, and unlawfully propelled one fo its locomotive engines, to wit, engine number three-hundred and twenty-nine (No. 329), in charge of its negligent and unskillful agent and servant, to wit, one Taylor Groves as aforesaid, over and upon the plaintiff, and crushed, wounded, and cut off one of the plaintiff's legs, and bruised his
25 hips, thighs, arms, and chest, and caused him great and long-continued bodily suffering in consequence thereof, and necessarily put the plaintiff to a great outlay of money, to wit, the sum of five thousand dollars, in providing medical attendance, medicines, care, boarding, nursing, and purchasing an artificial limb to supply the place of the limb so crushed, wounded, and cut off by the wrongful acts of the defendant as aforesaid, and other wrongs to the plaintiff then and there did, to wit, at the town and county aforesaid, in the State of West Virginia, to the damage of this plaintiff thirty thousand dollars ($30,000.00) and therefore he brings his suit, &c.

DAVENPORT AND DOVENER,
Attorneys for Plaintiff.

And on another day, to wit, on the 4th day of February, A. D. 1879, the defendants filed in the clerk's office of the circuit court of the United States for the district of West Virginia a demurrer to the amended declaration of the plaintiff, in words and figures following, to wit:

OAKLY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

26 In the circuit court of the United States for the district of West Virginia. In case.

And the defendant, by Boygess and Hutchinson, its attorneys, comes and defends the wrong, &c., and says that the said declaration, and each count thereof, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his action aforesaid thereof against the defendant, and that the said defendant is not bound by law to answer the same. And this it is ready to verify. Wherefore, by reason of the insufficiency of the said declaration, and each count thereof in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid thereof against it, &c.

C. BOYGESS &
JNO. A. HUTCHINSON,
Attorneys for Defendant.

I, John A. Hutchinson, an attorney practicing in said court, certify that the foregoing demurrer is proper to be filed, and is not interposed for delay.

JNO. A. HUTCHINSON.

27 And on another day, to wit, on the 22d day of February, 1879, at a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg on that day, the following order was made and entered of record, to wit:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In case.

For reasons appearing to the court this cause is continued until the next term.

And on another day, to wit, on the 27th day of January, 1880, at a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg on that day, the following order was made and entered of record, to wit:

OAKLY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on case.

This day came the parties, by their attorneys, and the demurrer heretofore filed in this cause; being argued by counsel, the court is of

28 opinion to overrule said demurrer and thereupon the defendant says that it is not guilty of the said supposed trespass laid to its charge, or any or either of them, in manner and form as the said plaintiff hath thereof complained of it, and of this it puts itself upon the country; and the plaintiff doth the like, and issue is thereon joined.

And on another day, to wit, on the 28th day of January, 1880, the following order was made and entered of record, to wit:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the case.

This day came the parties, by their attorneys, and the order entered herein on the 27th day of January, 1880, is set aside, and the defendant demurred to the plaintiff's amended declaration filed herein on the 12th day of December, 1879, and the same was set down for argument, and was argued by counsel; upon consideration whereof the court doth overrule the said demurrer. And thereupon the defendant says that it is not guilty in manner and form as the plaintiff has alleged, and of this it puts
29 itself upon the country, and the plaintiff doth the like, and this cause is set for trial on the 2d day of February next.

And on another day, to wit, the 3d day of February, 1880, the following order was made and entered of record, to wit:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the case.

This day came the parties, by their attorneys, and upon motion of the plaintiff, Alfred Rhinestrom, esq., was sworn to faithfully report the evidence in this case, and thereupon came a jury, to wit, T. S. Conley, Henry Fisher, Samuel Stewart, G. J. Hopkins, L. A. Beckwith, F. R. Rose, W. H. Sharpneck, J. E. Remley, James W. Dils, Randolph Logan, G. W. Taggart, and John P. Wait, good and lawful men, selected according to law, who being sworn to well and truly try the issue joined in this case and a true verdict render according to the evidence, having heard a portion of the evidence, and there not being time to hear the whole thereof, were adjourned until to-morrow morning at 9 o'clock.

And on the following day, to wit, on the 4th day of February,
30 1880, the following order was entered of record, to wit:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the case.

This day came again the parties, by their attorneys, and the jury that

was empanneled and sworn in this cause on yesterday appeared pursuant to adjournment, and having heard further of the evidence, and there not being time to hear the whole thereof, were adjourned until to-morrow morning at 9 o'clock.

And on the following day, to wit, on the 5th day of February, 1880, the following proceedings were had and entered of record, to wit:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the case.

This day came again the parties, by their attorneys, and the jury empanneled and sworn on a former day of this term appeared pursuant to adjournment, and having heard the argument of counsel, on their
31 oaths do say, "We the jury find for the defendant on the issue joined."

And on another day, to wit, on the 12th day of February, 1880, the following order was made and entered of record:

OAKLEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trepass on the case.

This day came the parties, by their attorneys, and the plaintiff moved the court to set aside the verdict rendered in this cause on the fifth day of February, 1880, and grant a new trial; and said motion was set down for argument, and being argued by counsel and maturely considered by the court, the court doth overrule said motion and refuses to set aside the verdict of the jury rendered herein.

MEMORANDUM.—Upon the trial of this cause and before the discharge of the jury empaneled herein, the plaintiff excepted to certain rulings of the court and tendered his bills of exceptions thereto, numbered respectively one, two, three, praying that the same may be signed, sealed by the judge, and made part of the record in this cause, which is now accordingly done.

32 The bill of exceptions referred to in the foregoing order are in the words and figures following, to wit:

In the circuit court of the United States, 4th circuit, district of West Virginia.

OAKLY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } Trespass on the case.

Be it remembered that on the trial of this cause the following was the

evidence offered upon the part of the plaintiff and defendant to sustain the issues joined respectively, that is to say.

OAKEY RANDALL, plaintiff, called, sworn, testified as follows:

Direct examination by Mr. DOVENER:

Ques. Are you the plaintiff in this suit?

Ans. Yes, sir.

Ques. Were you in the employ of the Baltimore and Ohio Railroad in 1874? And, if so, give us an account of your employment.

A. I was.

Ques. How long had you been in the service, and in what capacity?

33 Ans. I don't recollect how long I had been in the service.

Ques. About how long?

Ans. I suppose two or three months, likely.

Ques. Whereabouts were you engaged?

Ans. I was engaged between Wheeling and Grafton.

Ques. In what capacity?

Ans. As a brakeman.

Ques. Well, sir, where did you first run on the road?

Ans. I first run from Wheeling to Glover's Gap; then I was removed from that to Cameron, to run from Cameron to Glover's Gap, over the hills.

Ques. By whose orders?

Ans. By the orders of Charles Woodward.

Ques. Who was he?

Ans. He was supervisor of trains then.

Ques. How long did you remain there?

Ans. I remained there about 3 weeks.

Ques. By what order, if any, did you leave there?

Ans. Charles Woodward told me that Bud Jasper——

(Objected to by Mr. Hutchinson.)

By the COURT:

Ques. State what instructions you received.

Ans. Mr. Woodward came to me and asked me if I would like to go on the way train with Jasper. I said I would be willing to do anything he said. He said, "I hate to take you away." I told him I would go on Thursday; on Thursay night I went to the Gap, and didn't come back in time for the way train. Saturday morning I went out with Mr. Jasper to Grafton on the way train.

34 By Mr. DOVENER:

Ques. In what capacity did you go out?

Ans. As brakeman.

Ques. Did you brake on the way out from there to Grafton?

Ans. Yes, sir; I did.

Ques. Tell what took place there?

Ans. On Saturday night Mr. Jasper came to me and asked if I didn't want to go home that night.

Ques. How long did you have to lay over before you went out again?

Ans. Until Monday morning.

Ques. Were you compelled to return on Saturday night?
Ans. No, sir.

By the COURT:

Ques. Where did you go Saturday evening?
Ans. Home.
Ques. How long did you remain there?
Ans. Until Sunday evening.
Ques. What did you do?
Ans. I came to Farmington and met Mr. Jasper; he said he had no brakeman and wanted me to go back with him and he would allow me for my time.

By Mr. DOVENER:

Ques. Did you get aboard?
Ans. I did, sir.
Ques. Tell what you did?
Ans. I got on the train and broke up to Grafton; he notified me to hold them up through Fairmount; he told me to go into the old
35 bank track, with the exception of 3 cars, and back the two cars on to the new bank track and bring the others to the Y with the engine; I got on the foot-board and the engineer gave me his key and stopped his engine.
Ques. Key of what?
Ans. Switch; he stopped his engine.
Ques. Where?
Ans. Below the ball; west of the ball at Grafton.

By the COURT:

Ques. How far?
Ans. Not very far.
Ques. 25 yards?
Ans. I don't reckon it was that far from the ball to where he stopped.

By Mr. DOVENER:

Ques. Where was the ball?
Ans. It was likely 15 yards, more or less, from the ball; he then told me to go and unlock that ball.
Ques. Was Jasper on the train?
Ans. At the lower end; I couldn't find the ball, and he told me to go on a little farther, and I went and found the ball.
Ques. I am talking about the first ball?
Ans. I unlocked that ball and left the key in the ball, and he got it and locked it up.
Ques. I want you to talk about the first switch in the order of their events?

By Mr. DOVENER:

Ques. Tell us about the first switch when you struck Grafton?
36 Ans. When I came to Grafton I went into the old bank track.
Ques. When you got to Grafton I want to know what you did from the time the train stopped on the main track in passing into this place, in the order of the events?

Ans. I unlocked the ball and pulled out the lower end from the main track to the old bank track.

Ques. When you unlocked the ball what did you do?

Ans. I cut loose those cars; I pulled up to the other switch, or the engine did; the engineer gave me his key and told me to unlock that ball; he wanted to go out to the side track; I went——

Ques. That is the second switch?

Ans. Yes, sir; I went and got down and got the key in the ball and was unlocking it, and the first thing I knew I was run over.

Ques. Describe to the jury what it was run over you?

Ans. I was struck by the tender coming backward.

Ques. Was there anything attached to that?

Ans. Locomotive engine.

By the COURT:

Ques. Tell what engine it was, if you know?

Ans. It was said to be 329; I don't know myself.

Ques. Do you know who was in charge of it?

Ans. Said to be Taylor Groves; I don't know that he was in charge of it.

37 By Mr. DOVENER:

Ques. Do you know Taylor Groves?

Ans. Yes, sir; I know him since this happened.

Ques. Was he in the employ of the company at that time?

Ans. I suppose he was, or he wouldn't have been likely to have been on the engine.

Ques. Tell the jury where it struck you and the position you were in.

Ans. I had my head east.

Ques. What position was you in?

Ans. Down in this position (indicating a stooping position). The tender drove back and struck me on the hip and kind of turned me over, and I got this foot over the track, and this pretty near, and turned me clear around; and after the engine passed me I seen the head-light as it went away from me.

Ques. After it passed over what injury did you observe on yourself?

Ans. I seen I was hurt, and hurt badly; and somebody ran with a light; my foot and ankle was mashed.

Ques. Which foot and ankle?

Ans. Left foot and ankle.

Ques. Were you bruised?

Ans. Yes, sir; I was bruised on this hip (*directing* left hip), left hip.

Ques. Were you cut or bruised in any other parts of your body?

38 Ans. Hurt here (indicating scar on forehead).

Ques. Any place else?

Ans. It seems to me I was cut right here (indicating); I wouldn't be certain; it just seems to me I was.

Ques. State any other injuries, if you know.

Ans. There was no more injuries that amounted to anything.

Ques. State whether or not the engine which ran over you, there was any bell rung upon that engine or whistle blown?

Ans. There was not, sir.

Ques. Whereabouts in the town of Grafton did this happen?
Ans. About 75 yards above the upper end of the Grafton Hotel.
Ques. Is there any bridge across the track there—elevated bridge?
Ans. There is one at the upper end.
Ques. With respect to that bridge, where did this happen?
Ans. Above that bridge.
Ques. How far above that bridge?
Ans. Maybe a little further above—the only——
Ques. About how many yards—40 or 50, or whatever think; give us your estimate about it?
Ans. I suppose about 50 or 60 yards; maybe more or less; I never measured.

Ques. Have you seen that switch-ball since, and the switch?
39 Ans. Yes, sir.

Ques. State whether or not it was in the same condition when you saw it afterwards as when you approached it that evening?
Ans. I think it was.
Ques. Describe to the jury what kind of a ball this was, what you had to do with regard to opening and shutting the switch, and how situated with regard to the two tracks—the one which your train intended to pass off from to the other?
Ans. It was a lever, the bar, 18 or 20 inches long; it worked riglit in the center of a tie. If you moved it back from that way (indicating) it come 4 inches of the main track, and if you throwed it back that way (indicating) it come 4 inches of the other track; I mean 4 inches from the edge of the lever to the end of the rail.

By the COURT:

Ques. Repeat that.
Ans. I say there was a lever worked up in the centre of a tie, the tie laid on the ground, and when it was lying on this side, the end of the lever laid within 4 inches of the rail, and if turned over it laid 4 inches of the other end.
Ques. Either way it was turned it laid within 4 inches of the rail?
Ans. Yes, sir.

40 By Mr. DOVENER:

Ques. When that switch was closed what position was this lever in?
Ans. Lying down.
Ques. And when you opened the switch, what position?
Ans. Lying down.
Ques. Was that a cold season of the year?
Ans. Yes, sir.
Ques. I want to know whether water and ice was collected around the place where that bar was lying?
Ans. I don't recollect how it was that night.
Ques. Had you opened that switch yet when this accident happened?
Ans. No, sir.
Ques. How far had you proceeded in opening the switch?
Ans. I put my key in and was about to turn to twist my key in, if I recollect right.

Ques. (After indicating on the table the supposed position of track and switch). When the lever was over in that condition (indicating) the connection wasn't made;

By Mr. DOVENER:

Ques. What was you doing—closing or opening the switch?

Ans. Opening; the lever was on the right side.

Ques. Near which track?

Ans. On the side of the old main track; of the main track.

41 Ques. Which track is it this train and locomotive came down that injured you?

Ans. That was on the same track.

Ques. What rate of speed was this engine running, if you know?

Ans. Indeed, I don't know, sir.

Ques. Give us your estimate, whether a very high rate of speed or slow?

Ans. It does seem to me that it was running very fast, as the light went away from me.

Ques. State whether there was any lights. If you observed them on that engine; when did you first observe any lights?

Ans. After they run over me.

Ques. On which end of it?

Ans. On the hind end; it was going backwards; and it had a head-light. The tender was west and the engine east; and the light was on the east—engine. The light was on the engine.

Ques. Was there any light on the tender?

Ans. I didn't see any.

Ques. State whether you observed any person on that engine or tender, or heard any alarm given?

Ans. I did not.

Ques. What occurred on that engine as far as you observed, after it run over you, as to its stopping or going ahead?

Ans. The last I seen of it it was going down the road. And that's

42 about all I observed about it that night.

Ques. Did you hear any signal given afterwards?

Ans. No, sir; I did not.

Ques. What part of the town of Grafton was this in?

Ans. This was in about the center of it, I reckon.

Ques. Any streets near there, or alleys, public crossings?

Ans. There is a street almost forninst it; a little alley that goes up, and there is another street that goes along.

Ques. Was it used as a public crossing?

Ans. Yes, sir; I have seen persons crossing it forwards and backwards, going to the shop.

Ques. How frequently? What number daily?

(Objected to.)

Ques. What accommodation, if any, was there im'ediately opposite there for passengers passing up and down?

Ans. There was a pair of steps right close there where I got hurt; I think a little below it, likely.

Ques. What kind of steps were those?

Ans. Plank steps, is my recollection.

Ques. Do you know of any plank walks along there?
Ans. Plank walk right above there goes out along to the bridge.

By Mr. HUTCHINSON:

Ques. To what bridge?
Ans. The bridge that crosses over the railroad.
Ques. You mean that structure above the track?
Ans. Yes, sir.

43 (By Mr. DOVENER.) I will ask the witness if this (indicating diagram) represents properly the diagram of the track as it was at that time.

(By the COURT.) You may use that paper for the purpose of illustration, and nothing else.

(Paper marked "A.")

By Mr. DOVENER:

Ques. Now, then, whereabouts did that accident happen on this plat?
Ans. Right in there. (Indicating the point marked on paper, "A" ground switch-ball.)
Ques. Whereabouts are the steps you referred to?
Ans. I think the steps are a little below there, or were then; I don't know that the steps are there at all now.
Ques. Below what, the ground switch-ball?
Ans. Yes, sir; towards Wheeling.
By the COURT. Towards the Grafton House?
By Mr. DOVENER. Yes, sir; but on the opposite side.
Ques. Would that (indicating on paper A) properly represent the bridge passing across the tracks—the elevated bridge?
Ans. Yes, sir; it does.
Ques. Does that walk, then—board walk—properly represent that, that you speak off as a board walk?
Ans. The board walk that I spoke of runs right along by the Globe House and runs out by the bridge.
Ques. Where was you taken after that?

44 Ans. I was carried from there to the Grafton House.
Ques. Was any medical attendance called in?
Ans. There was some doctors came there.
Ques. What Dr. performed the operation on you?
Ans. Dr. Thayer.
Ques. Where was you at the time the operation was performed on you?
Ans. I was taken after that to the Powell House; the widow Powell's.
Ques. What was the operation performed on you—cut your leg off?
Ans. Yes, sir.
Ques. How long after your leg was mashed was it before the operation of amputating your leg was performed?
Ans. My recollection, it happened about 9 or 10 o'clock; and the next day about the same time, about 9 or 10 o'clock, or may be a little later.
Ques. In the morning?
Ans. The next day.
Ques. How long did you remain there at the Powell House?
Ans. I remained there, I think, 9 weeks.
Ques. Where was you taken then?

Ans. I was taken from there to my father's.

Ques. During the time you were at the Powell House who attended on you as a nurse?

Ans. My mother.

45 Ques. When did she get there?

Ans. The next day, a while after my leg was amputated.

Ques. Did she remain with you?

Ans. She remained with me until I went home.

Ques. How long were you confined to your bed, if at all, after going home?

Ans. About three months after I began to go around on crutches.

Ques. What kind of crutches did you use first?

Ans. Common crutches.

Ques. Well, how many—6 or 8 or a dozen?

Ans. I used two.

Ques. How long did you go that way?

Ans. I went that way, I reckon, about very close to a year.

Ques. After going home had you any medical attendance or medicines necessary on account of these wounds?

Ans. Yes, sir.

Ques. What doctor, if any, attended you there?

Ans. Dr. Ogden and Dr. Courtney.

Ques. Who paid for the medicines during the sickness down at home?

Ans. I reckon I did.

Ques. I reckon you know, don't you?

Ans. I did.

Ques. Who employed these physicians, Ogden and Courtney?

46 Ans. I did.

Ques. What did they do about your wound?

Ans. It hadn't healed up altogether when I left Grafton.

Ques. They were doctoring it—what for?

Ans. My recollection is they came and took a stitch on it; it broke loose.

Ques. You spoke of other bruises; one on your hip. What, if anything, was the result of that bruise on your hip?

Ans. I was bruised on the left hip, here, and it gathered and broke.

Ques. Well, sir, what was the character of that gathering as to its being painful, pleasant, or otherwise?

Ans. It was very painful.

Ques. When it broke what came out of it?

Ans. Corruption.

Ques. Who opened that for you?

Ans. Dr. Thayer.

Ques. Dr. Thayer is present here?

Ans. Yes, sir.

Ques. You say that wound over your left eye is the result of that?

Ans. Yes, sir; it didn't heal up; it was left with coal in it.

Ques. Describe to the jury the character of your sufferings during the time of this sickness as the result of this accident which you have described.

47 Ans. I don't know that I could describe.

By the COURT:

Ques. Did you suffer intensely?
Ans. Yes, sir; I did, sir.
Ques. What education had you received before this question?
Ans. I had none, sir, at all.
Ques. Except what you had?
Ans. Except just what I——(interrupted).
Ques. What was your circumstances financially? *Ques.* Was you at that time a poor man or not?
Ans. I had nothing only what I worked for.

By Mr. DOVENER:

Ques. State whether or not in the course of your employment by the Baltimore and Ohio Railroad you had ever been directed or called upon to open that switch-ball before?
Ans. I never had, sir, to my recollection.
Ques. State whether or not in your employment in the service of the B. & O. R. R., as you have described it, you necessarily observed that ball or the character of that ball?
(Objected to by Mr. Hutchinson. Objection sustained.)
Ques. (Suggested by the court and ad'pted by plaintiff's counses.) Had you made any examination of that switch, or had your attention been called to it?
Ans. I had not, not until after I was hurt.
Ques. What opportunities had you with reference to this switch and its construction to observe it before the night this accident happened?
Ans. Well, I had none; in fact, I never worked around the yard any.

48 By the COURT:

Ques. State what you know of the construction.
Ans. I know nothing; that is, before I was hurt, I mean.
Ques. Mr. Randall, you have described this switch before. State whether or not that switch, as you have described it, is a safe or dangerous switch in the place where it was—point where it was.
(Objected to by Mr. Hutchinson. Objection sustained.)

Cross-examination by Mr. HUTCHINSON.

Ques. You say you reached Grafton Saturday night before the accident?
Ans. Yes, sir.
Ques. What night was the accident?
Ans. The accident was on Sunday night.
Ques. You went home on Saturday night?
Ans. I did.
Ques. How far from Grafton or to what town?
Ans. I got off at Farmington.
Ques. Is that your home?
Ans. Worthington, 5 miles from there.
Ques. You say you came down to Farmington Sunday night?
Ans. Saturday night I said.
Ques. Farmington?
Ans. Yes, sir.

Ques. You came down to Farmington Sunday night and got
49 aboard of this train at the request of whom?
Ans. I came over from home Sunday night.
Ques. Did you get on at Farmington?
Ans. I did.
Ques. You went from Grafton home on Saturday night and on Sunday night this man requested you to get on this train?
Ans. Yes, sir.
Ques. Who requested you?
Ans. Bud Jasper.
Ques. Who was he?
Ans. My conductor.
Ques. On what?
Ans. The way-train.
Ques. Was that the way-train?
Ans. No, sir; it was not.
Ques. What train was he aboard on Sunday night?
Ans. He was doubled down from Grafton; a freight train.
Ques. What character of freight?
Ans. Local train; freight cars on it, anyhow.
Ques. Do you know what it was called or known in the then—; what freight; how many cars were on that at Fairmount?

By the COURT:

Ques. Was there more than 2 or 3?
Ans. Yes, sir.
Ques. How many do you think there were?
Ans. I suppose 15 or 20.

By Mr. HUTCHINSON:

Ques. Who was braking on the train when you got aboard?
50 Ans. Nobody braking for him.
Ques. Nobody at all.
Ans. No.
Ques. Were you at Farmington when that train arrived there?
Ans. I was.
Ques. Besides Jasper, who else was in charge of the train besides Jasper and the engineer?
Ans. Nobody.
Ques. About 20 cars?
Ans. Yes, sir; about as many as they have down from Glover's Gap—15 or 20.
Ques. You told the jury from Farmington, Sunday night, down to Grafton, you were the only brakeman?
Ans. I was the only brakeman on that train that I seen or heard tell of.
Ques. You arrived at Grafton what time of night on this freight?
Ans. I suppose between the hours of 8 or 10 o'clock; between there some place, between 8 and 10 o'clock. I think it was due there about 8 o'clock, and something afterwards; but I think we were behind time.
Ques. Whereabouts in or near Grafton did the train pull up?
Ans. West end of Grafton.

Ques. How near the hotel was it; at or west of the hotel?
51 Ans. It was about 100 yards, or more may be.
Ques. From where?
Ans. From the hotel; that is, from the platform to the ball.
Ques. The first switch?
Ans. Well, no; there is other switches there.
Ques. How near the hotel was the train first pulled up, as you entered Grafton—entering Grafton?
Ans. Why, I don't understand the question.
Ques. Where did you first stop, as you reached Grafton, with your train?
Ans. I told you; about 100 yards below, at the ball?
Ques. Which ball?
Ans. Where I pulled in.
Ques. Describe where the first switch is located.
Ans. Located at the west end of Grafton; that is the first switch I pulled into.
Ques. Is there any other switch?
Ans. Yes, sir.

By the COURT:

Ques. Tell where this switch is, as near as you can; can't you tell by some location about the ground? Point it out on that map.

By Mr. HUTCHINSON:

Ques. I want to know this, how near to the hotel (which is the most prominent object there), west of the hotel, is this switch located which you say you pulled up and entered with that train?
Ans. I suppose, sir, it is about 100 yards west of the hotel.
52 Ques. What kind of a switch is it?
Ans. Top switch, with a ball.

By the COURT:

Ques. Perpendicular switch, is it?
Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. How far after entering that switch did you proceed, and where did you next stop with this freight train with Jasper aboard?
Ans. Up where we was going to cut loose those cars; then I opened the ball, or went to open it, when I got hurt.

By the COURT:

Ques. You went through one switch and attempted to go through another one—the second you had anything to do with?
Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. Whereabouts were these freight cars cut loose from this locomotive, how near to this bridge at the upper part of this platform above the hotel?
Ans. Cut loose right along under the bridge, then pulled up may be some above and some below the bridge. I think I was pulled up there—yes, and part of them below.

Ques. Did you get aboard of the train after you got through the first switching?

Ans. I got on the foot-board, I reckon.

Ques. Whereabouts where you on the train when it stopped, and you were directed to open the ground switch?

53 Ans. I suppose I got off.

Ques. I asked you where. I want to know what you know, not what you suppose.

Ans. That was above the bridge.

Ques. When you got off?

Ans. Yes, sir.

Ques. Now, how far above this bridge?

Ans. Where we stopped? I suppose 30 or 40 yards, more or less.

Ques. How near to the ground switch?

Ans. Well, I suppose we was fifteen—we was up about as close as they generally pull.

Ques. Up as close as they generally pull to the switch?

Ans. I suppose we was. Well, its twenty-five or thirty feet, more or less; I couldn't tell exactly; I didn't measure the distance.

Ques. You say, then, after the cars were cut off from the locomotive you were directed by whom to go to the switch?

Ans. Bud Jasper. I was directed crossing West Fork Monongahela River.

Ques. And you went to do it?

Ans. I did.

Ques. He was the same conductor whose train you came up on from Farmington, was he?

Ans. Yes, sir.

Ques. You got the key, you told us, from the engineer?

Ans. Yes; that's my recollection of it.

54 Ques. You knew how to open the lock of the switch, did you?

Ans. After I got to it I did.

Ques. Had you ever opened switch locks before?

Ans. I have opened ball locks.

By the COURT:

Ques. What do you call ball locks?

Ans. The ones works up here (indicating).

Ques. Is the lock any different on the perpendicular lever from the ground lever?

Ans. I don't think they are.

By Mr. HUTCHINSON:

Ques. Same lock?

Ans. Same kind of key, anyhow.

Ques. You say you run in the first place from Wheeling to Grafton?

Ans. No, sir; I didn't say so.

Ques. Didn't you say between Wheeling and Grafton?

Ans. First trip, Wheeling to Grafton. I was at Wheeling on duty.

Ques. Performing the duties of brakeman at Wheeling?

Ans. Yes, sir.

Ques. Use switches at Wheeling?

Ans. Yes, sir; not ground switches.

Ques. You tell this jury you didn't use ground switches at Wheeling?

Ans. I never recollect seeing a ground switch before in my life.

Ques. You didn't use a ground switch at Wheeling?

Ans. We didn't run no train to Wheeling. We always stopped at Benwood.

55 Ques. Did you use switch bars at Wheeling?

Ans. Yes, sir.

Ques. Will you tell the jury you didn't use ground levers?

Ans. I did not. I never recollect seeing a ground ball before that time. I might have since in this yard up here.

Ques. Will you tell this jury the first switch you opened Sunday night with this freight train west of the Grafton Hotel was not a ground switch?

Ans. No, sir; it was not at that time. I don't know what it is now.

Ques. Don't you know it was a ground switch then?

Ans. No, sir; I don't.

Ques. Was your attention particularly called to it that night that it was a ball switch?

Ans. You could very easily see it if you would take your lamp up to it.

Ques. Then, you had a lamp?

Ans. I did.

Ques. How often had you been at Grafton before this accident?

Ans. I don't know, sir; I couldn't tell the number of times. I had been there several times passing through.

Ques. How often had you been at Grafton as brakeman?

Ans. I don't recollect, but not very many times on duty.

56 Ques. On duty or off duty while you were in the service of the company, on or off duty, how many times had you been at Grafton in this yard?

Ans. I couldn't tell you.

Ques. Tell the jury whether you had seen this ground switch operated before that night.

Ans. Never had.

Ques. Had you been anywhere where they had?

Ans. I never had. Saturday night Bud Jasper got me to go up there. He wanted to show me the freight depot.

Ques. Did he show it to you?

Ans. Yes, sir.

Ques. Where did he show it to you?

Ans. I mean it was on Saturday night.

Ques. Mr. Randall, do you know that at that time all the 4th division engines did not pull through that switch?

(Objected to. Overruled.)

By the COURT:

Ques. Mr. Witness, tell the jury whether the railroad company used that switch to switch the trains upon the 4th division.

Ans. I didn't know there was such a ball there at that time.

By Mr. HUTCHINSON:

Ques. You knew when you entered on that switch after you left Farmington, and when you were crossing the Valley River——

Ans. I said Monongehala River.

57 Ques. Monongehela River, that you were to enter that switch?

Ans. No, sir; I didn't know it.

Ques. Weren't you told?

Ans. Told me to back them off in a new bank track.

Ques. You were told in entering Grafton you would have to switch through the first switch you described?

Ans. Yes, sir.

Ques. Then proceed on and switch through this other switch?

Ans. No, sir; I was told to pull out on the main track, cut loose, and switch back in a new bank track.

Ques. Wasn't you told you would have to switch there about that place?

Ans. Yes, sir.

Ques. You say Jasper told you that?

Ans. He did.

Ques. Did he describe the switch to you?

Ans. No, sir; he didn't.

Ques. Did you ask him how it was located?

Ans. I don't recollect. I don't reckon I did.

Ques. When you got the key from the engineer, did you ask him how it was operated?

Ans. He showed me where it was.

Ques. Did he describe how it was operated?

Ans. No, sir; he did not.

Ques. Did you ask him how?

58 Ans. No, sir; I did not.

Ques. You took your light and went to do it?

Ans. Yes, sir.

Ques. Do you know Taylor Groves?

Ans. I knew him since that time.

Ques. Know John Cooper?

Ans. I didn't see him for a long time.

Ques. You said you understood locomotive 329 was the one backed down and crushed your leg?

Ans. Yes, sir.

Ques. Was that the fact?

Ans. I don't know.

Ques. Do you know who was in charge of that locomotive?

Ans. Said to be Taylor Groves.

Ques. In what capacity was he acting?

Ans. Engineer.

Ques. Do you know in what capacity John Cooper was acting?

Ans. Conductor.

Ques. In the service of the B. & O. R. R. Co.?

Ans. Yes, sir; that was my understanding.

Ques. In the same service and the same company as you were?

Ans. Yes.

Ques. Something is said about a crossing; do you mean to say at the time of this account there was a public crossing where the public used as a public way from Grafton across over towards the river?

59 Ans. I said that is where I seen most of the hands going across.

Ques. Tell the jury whether or not the whole surface there isn't one net-work of tracks.

Ans. Yes, sir.

Ques. Wasn't you aware of that fact that night?

Ans. What fact?

Ques. Of the net-work of tracks above this bridge that arched the tracks?

Ans. I knowed there was several tracks there.

Ques. Knew there was a good many?

Ans. Yes; there was.

Ques. At the intersection of the Wheeling division and the Parkersburg division, isn't it there?

Ans. Yes, sir.

Ques. Will you tell the jury at this point of intersection there was a crossing?

By the COURT:

Ques. Is there any crossing at the place where this accident occurred?

Ans. No more than what I told you; I have seen shop hands, and crossed there myself several times; I never seen any wagons. I recollect going backward and forth there.

Ques. Did the general public use it outside of the employees of the B. & O. R. R. as a crossing?

Ans. Indeed I don't know about that.

By Mr. HUTCHINSON:

Ques. Don't you know below here, right at the east end of the plat-

60 form of the company's hotel, there is a stairway and a bridge leading from that platform up into the town of Grafton?

Ans. I do.

Ques. Isn't that connected with a plank walk paral'el/ with the side of the bank, with that town?

Ans. Yes, sir.

Ques. Wasn't it at that time?

Ans. I don't know whether it was or not.

Ques. Have you a distinct recollection, then, how these crossings were located at that time?

Ans. Nothing more than I have told you.

And the court adjourned until to-morrow, February 4th, 1880, at 9 o'clock a. m.

WEDNESDAY, *February 4th*, 1880.

Court met pursuant to adjournment.

OAKEY RANDALL resumed the stand, and was further cross-examined by Mr. HUTCHINSON.

Ques. Did you say yesterday even'g that at the time you received the injury you hadn't unlocked the switch?

Ans. That is to my recollection, sir.

Ques. How often, prior to this accident, had you been brakeman from

Glover's Gap to Wheeling?

Ans. I don't recollect.

Ques. Brake from Wheeling to Glover's Gap frequently?

Ans. Yes, sir; I have several times.

61 Ques. Now tell the jury whether you did not know as a fact, that in leaving Wheeling with your train, you are not compelled to pass through one of these same ground-lever switches?

Ans. If I did, I don't know it, sir. I never recollect of seeing any of them kind of balls with the exception of the one I got hurt, and one up in the yard.

Ques. I don't ask you what you saw; did you perform the duties of brakeman in opening switches at Wheeling?

Ans. Sometimes I did, and sometimes the conductor would do it; in fact, we never had much switching to do.

Ques. You said after the accident you were taken to Mrs. Powell's?

Ans. But the Grafton House first.

Ques. And finally to Mrs. Powell's?

Ans. Yes, sir.

Ques. Who nursed you?

Ans. My mother nursed me, and there was another fellow there; I don't know what his name was.

Ques. How long?

Ans. I don't recollect.

Ques. Wasn't that Mr. Bradford?

Ans. Yes, sir; Johnney Bradford.

Ques. Wasn't he there furnished by the company?

Ans. Yes, I guess so; he said he was.

62 (Question and answer objected to by Mr. Dovener. Objection overruled.)

Ques. How long did he nurse you?

Ans. I don't recollect now how long; whether he was there all the time or not.

Ques. Was Mrs. Powell's a boarding house?

Ans. Yes, sir.

Ques. Was she in and about where you were confined to the room?

Ans. She was in—passing through the room.

Ques. See her frequently?

Ans. Yes; I saw her sometimes.

Ques. Is her name Louisa Powell?

Ans. I guess that is it.

Redirect examination by Mr. DOVENER:

Ques. At the time that Mr. Jasper asked you to go on the train, did he have any brakeman at that time?

Ans. No, sir; he hadn't.

Ques. Did the train start from that point?

Ans. Started from Grafton, and came to Farmington, and there he changed off with some other fellow—another train.

Ques. Where did that train he changed off come from?

Ans. From Wheeling; the other fellow took his train and went back to Wheeling.

63 Ques. This train from Grafton down, what brakeman had it before you came across it?

Ans. None.

Ques. And it was the crew of the two trains that passed—changed?

Ans. Yes, sir.

Ques. I desire to ask you whether or not you could have opened that switch, the ground switch, without assuming the position which you did?

Ans. I could not.

(Objected to by Mr. Hutchinson. Objection overruled.)

Ques. Could you have opened that switch?

Ans. I could not, sir; without getting down and unlocking it.

Ques. In the position in which you was at the time, I mean?

Ans. No, sir; I couldn't.

Ques. In answer to one of Mr. Hutchinson's questions you speak of having a lamp with you. Where was this lamp at the time you was unlocking this switch?

Ans. In front of me; my lamp set east of me.

Ques. With respect to the direction which this train came?

Ans. Yes, sir.

Ques. State whether anyone from this car, if there had been a watchman on it, could they have seen that lamp when you were unlocking that switch?

64 Ans. They could if they had been looking, I suppose.

Ques. You spoke last night in answer to Mr. Hutchinson's question about Jasper having told you to open this first switch, and then told you you would have to open the switch above. Where was it he gave you this direction?

Ans. Gave it to me crossing the Monongehala River.

Ques. This was in 1874, you said in your examination-in-chief. What month and—

Ans. It was on the 22d day of March.

Ques. 1874?

Ans. 1874.

Dr. A. H. THAYER called for the plaintiff, sworn; testified as follows:

Direct examination by Mr. DORENER:

Ques. Dr., what profession do you follow?

Ans. Practice medicine.

Ques. How long have you practiced medicine?

Ans. Since 1862—18 years, sir.

Ques. Have you had occasion to practice surgery?

Ans. I have.

Ques. What position have you occupied during the last 18 years that called upon you to practice surgery?

Ans. For 4 years of that time I served in the United States Volunteer Army as surgeon.

65 Ques. Where were you residing in March of 1874?

Ans. Grafton.

Ques. Do you know Okey Randall, the plaintiff in this cause?

Ans. I do.

Ques. Did you see him on the night of March 22d, 1874; and, if so, under what circumstances?

Ans. Some time during the night of the 22d of March, 1874, about ten o'clock I was called upon to the Powell boarding-house to see a man run over by the train. I found the train passed over his left leg. I saw him that night and the next morning, and during the forenoon of the next day I amputated the leg.

Ques. Who was that?

Ans. Okey Randall.

Ques. Describe the wounds you found on his person, and the character of those wounds.

Ans. I found that the left ankle, and for a distance of perhaps 6 or 7 inches above the ankle it had been crushed; his left hip was badly bruised and a few other slight bruises.

Ques. Did you observe anything with respect to his back?

Ans. The bruises on his hip and thigh extended to his back—that was really one bruise.

Ques. What was the character of that bruise, serious or otherwise?

Ans. It was what we call a serious bruise.

66 Ques. Describe the character of the laceration of that portion of the leg you say was run over.

Ans. It was almost severed; the bone was crushed at the time I saw it.

Ques. You attended on him as a physician?

Ans. Yes, sir; I attended on him from the 22d of March, 1874, until the 16th of May.

Ques. Well, sir, state whether, in your judgment, from the character of that wound it was necessary to amputate that leg.

Ans. It was.

Ques. For what purpose did you amputate the leg?

Ans. To save the patient's life.

Ques. With respect to sound flesh and the bruises which you say you witnessed as the result of this accident, where did you amputate?

Ans. I amputated as low down, that is, as near the wound as possible to amputate, and make a successful operation of it.

Ques. How far below the knee did you really amputate?

Ans. I think it was about six inches below the knee; the bone was divided.

Ques. Will you describe to the jury the mode of amputation. I want the cuts made and everything, and whether those cuts were painful, and how the wound was sawed off?

(Objected to by Mr. Hutchinson.)

By the COURT:

Ques. State whether the man suffered much in the amputation of the leg.

67 Ans. Of course he suffered very much.

Ques. Was the operation a severe one?

Ans. Yes, sir.

By Mr. DOVENER:

Ques. What instruments did you use?

Ans. I used the ordinary amputating knife.

Ques. Anything else?

Ans. And the saw; then afterwards used needles in sewing the flaps together.

Ques. You say you continued to attend this man until May?

Ans. Yes, sir.

Ques. At that time was he able to go about?

Ans. He was not; but then he was in a condition to go home; he wasn't well.

Ques. He was then moved from there home?

Ans. Yes, sir; some place in Marion County.

Ques. What was your bill for your services?

Ans. My bill was about $125.00, sir.

Ques. Who was there waiting upon him at the time that you observed, Dr.?

Ans. On the 22d and 23d—well, on the 22d no regular nurse; on the 23d there was a man sent over by Mr. Hamilton, railroad agent, and the same day his mother came.

Ques. Do you know how long that man continued?

Ans. I do not; he was there for some time.

Ques. Did he continue until the time Randall left?

Ans. That I don't know.

68 By the COURT:

Ques. Tell who the man was.

Ans. I am not positive; I think he was a man named Bradford, but I am not positive as to that.

By Mr. DOVENER:

Ques. Dr., what was the character of this man's suffering, if any, after this amputation and during the time intervening between the operation and the time when you ceased to treat him on the 14th of May?

Ans. After the first few days his greatest suffering was caused by his bruise; it produced an abscess, and he suffered a great deal from that cause, being confined to his bed.

Ques. Was that abscess from the bruise you speak of on the left hip?

Ans. Yes, sir.

Ques. What was the character of that as to size and extent?

Ans. It was quite large; I opened it in the course of a week or 10 days; it discharged several pints of matter.

Ques. During that time what, if anything, did you observe as to his mind being affected?

Ans. His mind was affected some; no more than would be in his condition.

Ques. Well, that is what I am trying to get at; was he affected in that way—flighty or otherwise?

Ans. He was at times.

69 Ques. What was the character of this man physically, so far as you was able to observe?

Ans. He was in most excellent physical health.

Cross-examination by Mr. HUTCHINSON:

Ques. You were called in to see him on the night the injury was received?

Ans. Yes, sir; I was.

Ques. About what hour in the night?

Ans. I don't remember, sir; I paid no attention to the hour.

Ques. About how long after the accident occurred?

Ans. That I don't know. I don't know the hour it occurred. I should say it was some time between 10 and 12 o'clock, to the best of my recollection, when I was called to the Powell house.

Ques. Where you the first physician called?

Ans. I don't know; it was reported to me when I was called some other one had been there; my impression is it was my pupil, Dr. Wilson.

Ques. You examined the ankle?

Ans. I did.

Ques. You say it was crushed on the ankle and up 5 or 6 or 7 inches up the leg?

Ans. Yes, sir.

Ques. Could you tell from looking at the injury—external injury on that leg—how it had been placed on the track where it had been
70 struck by the wheel of the car or locomotive?

Ans. No, sir.

Ques. That is whether from its appearance to denote how it had been placed upon the track?

Ans. No, sir.

Ques. I' was the left leg?

Ans. Yes, sir.

Ques. Ankle that was mashed?

Ans. Ankle and some 6 or 7 inches above the ankle.

Ques. Was there any bruises in the right hip?

Ans. I noticed none.

Ques. Was there any injury at all in the right side of the body?

Ans. I have no recollection of any.

Ques. You say you amputated the leg the next day a few inches below the knee?

Ans. I did.

Ques. Did you administer any anesthetic?

Ans. I didn't; I proposed to Mr. Randall he should take an anesthetic, and he objected and said he preferred to have the operation performed without one, and did.

Ques. Did he complain?

Ans. Very little; he showed remarkable nerve in that respect.

Ques. Isn't that the usual way of performing a piece of surgery like that, to administer an anesthetic?

71 Ans. As a rule, in all operations we prefer to administer an anesthetic—he would have suffered less during the operation.

Ques. The object of administering an anesthetic is, then, to prevent suffering?

Ans. It is.

Ques. And he declined to take it?

Ans. He declined to take it.

Ques. You said you didn't remember how long this man Bradford remained there as a nurse?

Ans. I did.

Redirect examination by Mr. DOVENER:

Ques. Dr., you say in answer to Mr. Hutchinson's question the object

in administering an anesthetic is to relieve pain. Is it not also in order to insure the success of the operation, so as to have complete composure on the part of the patient?

Ans. Yes, sir.

Ques. After having performed this operation, in your judgment as a physician, was it necessary to administer an anesthetic to perform that operation successfully?

Ans. I regard all three of those questions, and I would like to make an explanation: 99 out of a hundred if they have a capital operation performed prefer to take an anesthetic; but if a man has a sufficient
72 amount of nerve it is better for *for* him not to take it. The administering of an anesthetic itself is attended by a certain amount of danger; therefore, if the patient will undertake to stand it without it, very few surgeons will object to his doing so.

Ques. Don't the books lay at down that if the patient is of that nerve it is better not to drug his system with it?

Ans. Yes, sir; the anesthetic relieves suffering during the operation only—makes no change afterwards.

Ques. Having performed that operation, having observed the physical condition of this man and his action during your operation, in your judgment, speaking in regard to this case, which was the better operation, with or without an anesthetic?

Ans. I should say without.

Ques. You have seen engines, tenders, and cars frequently there at Grafton, have you not?

Ans. I have.

Ques. Dr., with respect to the width or gauge of the railroad tracks there, which is the widest, the track on which the wheels run, or the body of the tender?

Ans. The body of the tender.

Ques. About how much wider is the body of the tender than the track?

73 Ans. That is a thing I really never paid any attention to.

Ques. Well, in your judgment about how much wider?

Answer. It is a thing I never noticed. I can't tell.

I. W. HAMILTON, called for the plaintiff, sworn, testified as follows:

Direct examination by Mr. DOVENER:

Ques. What is the difference, if any, between the width of the body of the tender and the wheels or track on your track there out at Grafton?

Ans. I don't know exactly whether I can tell exactly or not, but judge it would be about 9 inches.

Ques. On each side?

Ans. On each side; yes, sir.

Ques. 18 inches altogether?

Ans. I think so.

Cross-examination by Mr. HUTCHINSON:

Ques. Nine inches on each side?

Ans. I think it is about that.

Ques. Do you know where this switch is located which Randall says he received the injury?

Ans. I do.

Ques. What was the width of those tracks where this switch was located?

(Objected to and witness withdrawn.)

74 CHARLES MARTIN, called for the plaintiff, sworn, testified as follows:

Direct examination by Mr. DOVENER:

Ques. Do you know the plaintiff in this case, Oakey Randall?

Ans. Yes, sir.

Ques. Did you know him in the early part of 1874?

Ans. Yes, sir.

Ques. Where was you on the night of the 22d of March, 1874?

Ans. I started from Randall's home and went with him to Grafton.

Ques. Well, sir, where was you at the time this accident happened?

Ans. I was in Grafton yard.

Ques. How far from Mr. Randall?

Ans. I can't tell exactly.

Ques. About how far in feet, or yards, or miles?

Ans. Well, I say I was in 30 yards of him.

Ques. Did he have a lantern with him at the time?

Ans. He did.

Ques. Where was you standing with respect to the train track on which this engine backed down on?

Ans. Right on that.

Ques. And about 30 yards away, in which direction?

Ans. Towards the Wheeling end.

Ques. Where was Randall with respect to you and this engine that backed down, before the accident; was Randall above you?

75 Ans. Yes, sir.

Ques. Did you see that engine run over Mr. Randall?

Ans. I can't say I saw that engine run over him, I seen it just before it got to him and after it passed him.

Ques. How close was it to him when you first observed it?

Ans. 25 or 30 yards, I suppose.

Ques. What rate of speed was that engine going at, in your judgment?

Ans. I couldn't say exactly; my judgment is it was running from 12 to 15 miles an hour.

Ques. As soon as you observed the engine coming what did you do with respect to leaving that track?

Ans. I stepped off.

Ques. How near was this engine to you then, and what peril was you placed in?

Ans. I just got off in time for it to pass.

Ques. State whether or not in the rear end, or the end coming towards you, there were any lights, lanterns, or any person you observed on the lookout for the purpose of giving the engineer or person in charge signal.

Ans. None that I saw.

Ques. State whether you heard any bell ringing on that engine or any whistle blown?

Ans. I did not.

Ques. Where did that engine go after it passed?

76 Ans. Down on the main track. I don't know where it did go from there.

Ques. You went right to Mr. Randall?

Ans. After I stepped off the main track I started down towards our train. I goes down and heard Randall holler, and then I turned and went back to him.

Ques. How did you find his lantern?

Ans. I never seen his lantern.

Ques. After the accident?

Ans. Never did.

Ques. Had you seen it before that?

Ans. I had.

Ques. What position was Mr. Randall in at the time or as you last observed him before this accident happened?

Ans. He was kneeling down working at a switch ball.

Ques. Which direction was his face, do you recollect?

Ans. Don't recollect.

Ques. State whether or not you in company with Jasper, the conductor of your train, went to the office of the company to ascertain who that was in charge of that engine, and what engine that was.

Ans. We went to the office after we had taken him to his boarding-house.

Ques. What engine did you ascertain it to be?

Ans. I didn't pay much attention to the number of the engine.

77 Ques. What was the name of the party in charge of it?

Ans. My understanding his name was Taylor.

By the COURT:

Ques. Did you see the man that was on that engine?

Ans. I did not.

Ques. Do you know, of your own knowledge, who was on it?

Ans. No, sir.

Ques. How far was this above the railroad bridge or crossing across the railroad?

Ans. The switch ball?

Ques. Yes, sir; the point where this accident happened; about how far above that bridge?

Ans. 60 or 70 yards, more or less. I don't just know exactly.

Cross-examination by Mr. HUTCHINSON:

Ques. You say you came down to Farmington with Randall?

Ans. I came over to Farmington from his home.

Ques. You got on this train with him?

Ans. Yes, sir.

Ques. What part did you have in operating that train?

Ans. No part.

Ques. What part did you ride on?

Ans. I was pretty much all over it.

Ques. Did you get off with Randall when he first arrived at Grafton?

Ans. When we got to Grafton he was riding in the engine. I

78 was back on the train. I don't know when he got off.

Ques. Where you off of the train at the time the first switch ball was unlocked?

Ans. I don't know that I was.

Ques. Can't you tell anything about that?

Ans. I don't know where the first switch ball is; somewhere near the Grafton House or below it.

Ques. Did you see it that night?

Ans. I don't know that I did.

Ques. See him at it with a lantern?

Ans. Don't know that I did.

Ques. See it the next day?

Ans. No, sir; I don't know that I ever paid any attention to it.

Ques. You know about where it is located?

Ans. I think I do.

Ques. He was off the engine before you passed through that switch?

Ans. I don't know who unlocked that switch; don't know how he got through there.

Ques. Well, then, how far had they passed from that point towards the place of the accident before you got off this train?

Ans. I got off about opposite the Grafton House.

Ques. Had you anything to do with the management of that train?

Ans. Not a thing.

Ques. You got off then; what did you do then?

79 Ans. I was around there waiting for Randall to get through to go to the boarding-house.

Ques. Did you stay there until after the accident?

Ans. I stayed there and was following him around.

Ques. When you got off at the Grafton House was he off the train?

Ans. I suppose he was; I don't know anything about that.

Ques. When did you commence following him around?

Ans. As soon as I got off.

Ques. Where was he when you got off the train?

Ans. The first place I found him was at the switch.

Ques. Then you mean to say when you got off you didn't see him from that time until you saw him at the switch ball?

Ans. I think I saw him go to the switch ball, likely seen him at the switch and working at the switch ball.

Ques. How far were you away?

Ans. 25 or 30 yards.

Ques. Standing on what track?

Ans. Main track.

Ques. On which track was this train or locomotive he was switching off?

Ans. On a track adjoining it; I don't know which track that was.

Ques. Did you have a lantern?

Ans. I did not.

80 Ques. Did Randall have a lantern?

Ans. Yes, sir.

Ques. Have it in his hand?

Ans. It was setting down, I think.

Ques. Did you see him have a lantern in his hand that evening?

Ans. Yes, sir.

Ques. Was that light around; dark evening, wasn't it?

Ans. Very dark; the head-lights of the other engines and lanterns was the way I observed this engine coming.

Ques. What light permitted you to see the position of Randall, and he located on the ground?

Ans. His own lantern.

Ques. You could see by his own lantern he was kneeling down?

Ans. Yes, sir.

Ques. What direction was his face, towards the river or hill.

Ans. I don't know any more than he was kneeling down at the switch ball.

Ques. But don't recollect which side?

Ans. I don't recollect, no.

Ques. You said he was on his knees?

Ans. He was kneeling down working at the switch ball.

Ques. Can you describe to the jury how he was kneeling down?

Ans. No, sir; I don't recollect his position any more than he was kneeling down working at the switch ball.

81 Ques. Was he bending down or stooping down?

Ans. Well, I can't see any difference between stooping and bending.

By the COURT:

Ques. Was his knees on the ground?

Ans. Don't know whether he was standing on his feet, kneeling then, or on his feet bending over.

By Mr. HUTCHINSON:

Ques. You are swearing what you saw. I want to know whether you are telling this jury what you saw? Was he kneeling down on his knees?

Ans. I think I have answered that sufficient.

By the COURT:

Ques. Answer the question again.

By Mr. HUTCHINSON:

Ques. Was Mr. Randall at the switch ball kneeling down?

Ans. Well, he was down working at that switch ball; I don't know whether he was on his knees, or whether he was sitting down; any how he was down working at that switch ball, he wasn't as tall as when standing up.

Ques. Then he might have bending down?

Ans. Might have been bending down, or kneeling down.

Ques. Or some other way; you say that the locomotive and tender that was passing upon the main track was going at the rate of 12 or 15 miles an hour?

Ans. Yes, sir; to the best of my knowledge,

Ques. Well, what knowledge have you in running trains?

Ans. I have been about trains some; I have some knowledge of the speed; I never was engaged as workman; all I know being about the trains.

82 By the COURT:

Ques. Mr. Witness, what were you doing over there on the track when this accident occurred?

Ans. I was following Mr. Randall around; didn't want to get lost from him. I wanted to go with him to his boarding-house to stay with him.

Ques. You didn't live there?

Ans. No, sir.

Ques. Where did you live then?

Ans. At Worthington.

Ques. How far is that from Grafton?

Ans. I don't know the distance. I got on at Farmington.

Ques. How far is Farmington from Grafton?

Ans. 20 or 25 miles, I suppose.

By Mr. HUTCHINSON:

Ques. Did you say this is the first time you had been in Grafton?

Ans. I might have passed through or stopped there once or twice before; not over twice.

Ques. Then you are not familiar with that yard and place there?

Ans. No, sir.

Ques. You say Randall unlocked the switch ball?

Ans. Yes, sir.

Ques. Did you see a switch ball there?

Ans. Yes, sir; that night and afterwards.

Ques. How was the lever standing when you saw him working at it?

Ans. I don't recollect.

83 Ques. Standing up high?

Ans. I don't recollect.

Ques. Did you see the ball?

Ans. Yes, sir; that night and afterwards.

Ques. How large of a target was it? They call it a target.

(Objected to. Overruled.)

Ques. What kind of a lever had it?

Ans. It had no target as I saw; it had a lever, I suppose, something under two feet.

Ques. When did you see it?

Ans. That night.

Ques. Go up to it?

Ans. I did.

Ques. Examine it?

Ans. I did.

Ques. How was it located at the time you saw it?

Ans. Down. I don't know whether the switch was thrown out or not.

Ques. Did it have a ball on it?

Ans. No, sir.

Ques. You said a while ago he was unlocking a ball?

Ans. Switch ball; I don't know whether it was called a switch ball or lever; something that throws the track out to switch off trains.

Ques. That is what you saw?

Ans. Yes, sir.

By Mr. DOVENER:

I desire to offer in evidence the act of incorporation of the
84 town of Grafton, passed by the legislature of Virginia, I think it was, 1856, and 1866 of West Virginia, and February 15th, 1871, of West Virginia, incorporation of the town of Grafton. I may be mistaken as to the date of the acts.

By the COURT:

Consider every act in reference to the incorporation of that town in, and if there is anything liable to exception the attention of *of* the court will be called to it.

A. B. LAUGHLIN, called for the plaintiff, sworn, testified as follows:

Direct examination by Mr. DOVENER:

Ques. Where were you living in January, February, March, and April, of 1874?

Ans. January, February, and March?

Ques. Yes, sir.

Ans. I went to Grafton the first day of March, 1874. I was residing in Fairmount previous to that time.

Ques. Where you there on the night of the 22d of March, 1874?

Ans. Yes, sir.

Ques. Do you know Oakey Randall, plaintiff in this suit?

Ans. Yes, sir.

Ques. Did you see him on the night of the 22d of March, 1874?

85 Ans. I did.

Ques. Tell the jury under what circumstances you saw him. Where you were, how you came to observe, and everything.

Ans. Well, sir, I was at the Grafton House and started for my boarding-house.

Ques. What direction did you take?

Ans. I went east from the Grafton House and there was a young man with me, he wasn't just ready to start; I told him I would pass out the road and wait for him; I went out the road and crossed over the track and was just starting up the flight of stairs, or had just got to the top, or was just starting up, I wouldn't be positive about that.

Ques. Point out where you were about to step out, on this (showing witness paper marked "A," being diagram used for illustration of the locality).

Ans. This yard in Grafton, I was a stranger there at that time, I am not positive as to that yard.

By the COURT:

Ques. Can you look at that diagram and say that it regularly represents the various tracks, and location of the Grafton House and the buildings and switch, &c.; that it is a reasonably correct description of these various matters?

Ans. Well, now, sir, I don't know that I can. I was a stranger in the place at that time and haven't been there since.

86 By Mr. DOVENER:

Ques. Did you cross the tracks of road?

Ans. I did.

Ques. In what direction did you cross, from south to north, east to west, or contrary; how was it?

Ans. I crossed from south to north.

Ques. From the Grafton House to East Grafton?

Ans. Yes, sir.

Ques. At what point did you cross with respect to this bridge over the tracks there, above or below it?

Ans. East of the bridge.

Ques. And above it?

Ans. Yes, sir.

Ques. About how far above it?

Ans. Now, I don't know that I can say.

Ques. Give us your best judgement; I don't ask you to measure to an inch or foot or yard.

Ans. Well, I would suppose, rather a rough guess 60 or 70 yards somewhere along there.

Ques. You had crossed the track you say to the north side and was about to go up the steps; what steps where they?

Ans. They lead out on to a plank walk.

Ques. Placed there by the corporation or private parties?

By Mr. HUTCHINSON:

Ques. Do you know?

Ans. I don't know.

87 By Mr. DOVENER:

Ques. State what you observed then, including what called your attention to whatever you did observe.

Ans. I was standing at the foot of those steps waiting for the young man I spoke off, that is what caused me to stop there in the first place and my attention was directed by an engine and tender going westward.

Ques. On what track were they going?

Ans. I can't tell anything about them tracks. I know nothing about them, I saw that engine going westward with the tender, so to speak, the engine behind.

By the COURT:

Ques. Tender in front?

Ans. Yes, sir. I also saw a lantern setting on the track—a light—I don't know whether it was a lantern or not. I also seen the body of a man.

By Mr. DOVENER:

Ques. How near the light?

Ans. I suppose 3 or 4 or 5 feet; I know nothing about the nature of railroading; I didn't know whether that man was in danger; I turned and was just in the act of stepping up the steps and heard a man halloo, and turned and saw the light was gone, I went to the place and when I got there I believe two persons were there, I believe Mr. Jasper was one of the men, there was another gentleman.

Ques. Find the plaintiff, Mr. Randall, there?

88 Ques. What condition was he in then?

Ans. As near as I recollect he was sitting up on the track holding one of his feet somehow in this position (indicating).

Ques. Did you notice anything to indicate anything had happened to him?

Ans. Yes; I seen he had a foot and ankle mashed; something wrong with it.

Ques. You saw the engine going down there?

Ans. I did.

Ques. In your judgement, what rate of speed was that engine and tender going?

Ans. Oh, well, I can't tell definitely about that.

Ques. Give us your best judgment.

Ans. 10, 12, or 15 miles an hour; something like that.

Ques. State whether that engine, so far as you heard or knew, blew any whistle, rang any bell, or had any signal exposed in the direction they were going?

Ans. I didn't hear any whistle.

Ques. Hear any bell?

Ans. I didn't hear any bell; I saw no light except the head-light.

Ques. When did you see that, before it ran over the man or afterwards?

Ans. Afterwards; I have no recollection of seeing that head-light until afterwards.

89 Ques. State whether that was the usual crossing place for you and other citizens of Grafton at that time?

Ans. I had seen a great many persons passing there. I stated I went to Grafton 1st of March, 1874, and before that had resided in Fairmount.

Ques. You have resided, then, at Grafton ever since, haven't you?

Ans. No, sir.

Ques. Where do you live now?

Ans. Close to Fairmount; I went to Grafton first of March and stayed until the 17 of April. I believe I was working journey-work.

By the COURT:

Ques. Was this place used as a public crossing by the citizens of Grafton other than those engaged by the railroad company?

Ans. I seen a number of persons cross who were not laboring-men or in the employ of the company.

By Mr. DOVENER:

Ques. You was crossing there that night; what route did you strike at that crossing to take; state whether there was any alley, street, or any place of exit, crossing?

(Objected to.)

Ques. At that point we have been speaking *off*, state whether there was any alley or street or public road provided by the corporation for their citizens.

Ans. There was an alley or street; I do not know what you call it. I don't recollect whether it was to the right or left. I know I could

90 go up those steps and go up this alley to my boarding-house. My recollection is that alley was pretty near facing those steps.

Ques. State whether this alley was used as a place of ingress and exit by the citizens there.

Ans. Yes, sir; it was.

Cross-examination by Mr. HUTCHINSON:

Ques. You say you left the Grafton House and went above the bridge 60 or 70 yards; the bridge you speak of is that wooden structure over the track at the east of the platform of the Grafton House?

Ans. Yes, sir.

Ques. Isn't that the only crossing provided there for the public to cross?

Ans. I don't know that it is or is not; I know the public used that bridge at that time.

Ques. You knew at that time the public used that bridge?

Ans. Yes, sir.

Ques. Wasn't that the only public crossing provided for the people of Grafton at that place at that time?

Ans. I don't know whether it was or was not.

Ques. Referring to this structure?

Ans. I say it was at that place and at that time.

Ques. Was there any other public crossing provided for the public?

Ans. This is the third time I say I don't know that there was or there was not.

91 By the COURT:

Ques. Was that bridge there when this accident occurred?

Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. When leaving Grafton Hotel to go up to your boarding place didn't you pass by this bridge?

Ans. Yes, sir.

Ques. Instead of passing that way you went up over the tracks?

Ans. Yes, sir; I made an arrangement with this young man to meet him at a certain place.

Ques. You stopped at the steps waiting for him?

Ans. Yes, sir.

Ques. You said you didn't know whether you got up on top of the steps or waiting at the foot?

Ans. Yes, sir; as near as I recollect, I was at the foot of the steps.

Ques. When you were at the steps how far were you away from the place you saw this light on the track?

Ans. I can't tell exactly.

Ques. You have given your opinion as to how far you were from the bridge?

Ans. You want to know how far I was from the light, from this man that was hurt?

Ques. That's my question. From where you were standing, whether at the top or bottom of the steps.

92 Ans. Well, it will be a very rough one. I suppose, though, it was—I didn't think at the time I was over 30 or 40 feet. I might have been further away.

Ques. 30 or 40 feet?

Ans. Yes, sir.

Ques. In answer to a question you say those steps, you don't know whether they led direct to an alley or street or not from the tracks?

Ans. The alley is right close; I don't know whether it is precisely in front of the steps or not; very close.

Ques. Didn't those steps lead up to a plank walk?

Ans. Yes, sir.

Ques. Wasn't that plank walk connected with those steps?

Ans. I can't tell you whether it was or not.

Ques. You were there from March to April—middle of April?

Ans. Yes, sir.

Ques. Did you frequently pass along there?

A. I did in the night; I was engaged in the day-time. I generally walked down there after my day's work.

Ques. Don't you know that was the case—those steps led from the railroad track to the plank walk?

Ans. Yes, sir.

Ques. Connected with this plank walk, were they not?

Ans. I don't know that they connected with the plank walk. I know we could go from the steps to the plank walk.

93 Ques. In what direction from you, whether east or west, or immediately opposite to you, was this light when this man was injured?

Ans. West from me.

Ques. How far west—I mean not how far west, how far below?

Ans. Well, as I stated a while ago, as near as I can tell, 30 or 40 ft.?

Ques. Below you?

Ans. Westward from me.

Ques. You went out to the track, the place you saw him holding his ankle—foot?

Ans. Yes, sir; I believe he was sitting up when I got there.

Ques. You say you don't know one track from the other?

Ans. I don't know the names of the different tracks.

Ques. Did you look at the switch?

Ans. No, sir.

Ques. Paid no attention to that?

Ans. No, sir; I wouldn't have known anything about it if I had looked at it.

Redirect examination by Mr. DOVENER:

Ques. You don't know anything why the B. & O. R. R. put up this high bridge?

Ans. No, sir; I don't.

Ques. Do you know anything of a street having crossed the track there at that point?

Ans. No, sir.

94 JOHN KAUFMAN, called for the plaintiff, sworn, testified as follows:

Direct examination by Mr. DOVENER:

Ques. Mr. Kaufman, where was you in 1874; what business was you in?

Ans. Employed by the B. & O. road.

Ques. In what capacity?

Ans. Brakeman.

Q. How long was you in the service of the B. & O. road as brakeman, conductor, or other capacity?

Ans. Altogether about 7 years, I reckon.

Ques. From this time?

Ans. All together.

Ques. Well, sir, during that time state what experience you had handling switch-balls, opening and switching trains, whether once or twice?

Ans. I did it about every day, off an' on, day and night.

Ques. Was you acquainted with the construction of a switch and manner of opening one—a ground switch?

Ans. Yes, sir.

Ques. Are you acquainted with the switch that is used with an upright lever, and ball on top?

A. Yes, sir.

Ques. With reference to the safety and convenience of employees and brakeman, which one of these switches is the best?

(Objected to by Mr. Hutchinson.)

95 Ques. Have you ever seen this switch we are speaking of?

Ans. Yes, sir.

By the COURT. You are now offering this man as an expert?

By Mr. DOVENER. Yes, sir.

Ques. Well, sir, in your opinion state whether that was a safe and proper switch to be used at that point.

Ans. I can't say it was a very safe place at that time there.

Ques. I aint asking whether the place was safe or not, but taking into consideration the place it was; was that a proper kind of switch?

Ans. No, sir; I think not.

Ques. What kind of a switch would have been proper?

Ans. I think an upright switch would have been more convenient to handle.

Ques. State whether or not, taking into consideration the safety of the employee, and the position and point at which this switch was located, whether or not that was a proper switch to be located at that point, with a view to exercising the business of a brakeman with safety?

Ans. I don't think it's a very safe ball there.

Ques. Is it or is it not a safe ball there?

Ans. I think it is not.

Ques. Do you know of any one else being injured at that point?

96 Ans. No, sir.

Ques. Mr. Kaufman, do you know Tayler Groves?

Ans. Yes, sir.

Ques. Do you know whether he was in the employ of the Baltimore & Ohio Railroad at that time?

Ans. He was.

Ques. I' what position?

Ans. An engineer.

Ques. What engine was he in charge of, if you know, at that time?

Ans. 329.

Ques. Where did he run—what division of the road?

Ans. Grafton to Parkersburg.

Ques. What is that called, the branch?

Ans. Branch, yes, sir; was at that time.

Ques. Did you have any conversation with Groves as to this accident?

Ans. Yes, sir.

Ques. What, if anything, was said about his being the man who run over Randall?

(Objected to by Mr. Hutchinson.)

By the COURT:

Ques. When was this conversation, Mr. Witness, that you had with this man?

Ans. It was last September a year ago.

Ques. Was it while he was in the employment of the B. & O. Railroad Company?

Ans. Yes, sir.

Ques. Groves said that it was 329 that ran over this man, and
97 that he was in charge of it; is that a fact?

Ans. Yes, sir.

Cross-examination by Mr. HUTCHINSON:

Ques. You say you had been a brakeman for about 7 years?

Ans. Yes, sir.

Ques. Are you in the employ of the company now?

Ans. No, sir.

Ques. When did you leave it?

Ans. I left about 3 years in July, I think.

Ques. What have you been doing since?

Ans. Farming.

Ques. Where?

Ans. Marion County.

Ques. Any relation to Randall?

Ans. No, sir.

Ques. Did you quit voluntarily or was you discharged?

Ans. I was paid off; can't say I was discharged.

Ques. When did you quit?

Ans. I quit during the strike.

Ques. You were neither discharged or paid off?

Ans. Not at that time I wasn't paid off.

Ques. You know nothing about the construction of this ground-lever switch, do you?

Ans. Yes; I am well acquainted with the switch.

Ques. Do you know anything about the principle on which it is con-
.structed?

98 Ans. No, sir; not a great deal.

Ques. You said that isn't a safe switch in that place; what was it that made it an unsafe switch; what was the matter with this switch you refer to that made it unsafe?

Ans. Well, I think it was in a bad place there.

Ques. What was the matter with the place?

Ans. The condition of the yard.

Ques. What was the condition of the yard?

Ans. The switch—two tracks came together there—it was in a danger-ous posish?

Ques. Describe the place and dangerous posish?

Ans. In the first place you unlocked the ball right here (indicating), and unlocked the ball; it locked it up rather to the old main track.

Ques. Isn't that mode of locking and unlocking that switch adopted in all such cases?

Ans. Not at all switches.

Ques. That kind of a switch?

Ans. Yes, sir; only not in as bad places.

Ques. What was the difficulty with the place where that switch was?

Ans. In the first place, suppose I was down here now unlocking this ball, and during the time I was down here, stooping clear down—I would have to be down close to the ground while unlocking—there would
99 be an engine coming down south side and run over me, south side, backwards, or some other way, and no signal given while I was down in that posish, this engine coming down should happen to run over me; that's why I think it was a dangerous switch.

Ques. Then the place is a bad place because an engine should run along there and run over you while you are working at the switch?

Ans. Yes, sir; a man's in danger.

Ques. Do you know what the space was there between the two tracks where this switch was located?

Ans. I never measured; I suppose about 4 feet and something, may be 5: 4 to 5 feet.

Ques. Wasn't there room enough there for a man to stand in there for two trains to pass along?

Ans. Not if working the ball.

Ques. Wasn't there room enough between those two tracks to work that switch?

Ans. If there is two trains coming at once?

Ques. No, sir.

Ans. A man can't unlock that ball if there is an engine coming but what he has to get out of the way.

Ques. I asked if there wasn't room enough there between those two tracks to lock and unlock that switch without getting on either track?

Ans. Yes, sir.

100 Ques. Do you know it requires a man to unlock that switch to kneel down and stay down *and stay down* while unlocking that switch?

Ans. Requires a man to get down pretty low; dosen't require him to kneel.

By the COURT:

Ques. You mean to bend over?

Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. Were you ever accustomed to use that switch?

Ans. Yes, sir.

Ques. How many times?

Ans. Differant times.

Ques. How long were you in use of those switches?

Ans. About 7 years.

Ques. Are they not very frequently used on the B. & O. road?

(Objected to by Mr. Dovener; objection overruled; exception taken thereto by plaintiff, by counsel.)

Ques. Are they not commonly used?

(Objected to; overruled; exception.)

Ans. Yes, sir; few of them.

Ques. Are they not in common use where a switch is necessary between two tracks—are they not in use in such places on the B. & O. R. R., where you have been as brakeman?

Ans. Always have been used—yes, sir.

By the COURT. Do you refer to now, the present, or the past, Mr. Hutchinson?

101 By Mr HUTCHINSON. Yes, sir, we expect to show that he said he had not been in the employ of the company for three years.

Redirect examination by Mr. DOVENER:

Ques. I want to know if a man could unlock that switch without exposing his person to danger, if at the time of unlocking the switch an engine or train was passing along on that track?

Ans. No, sir; he could not.

Ques. What is the difference, in your judgement, between the body of a tender and the width of the track—which is the widest, and, if any difference, what is the difference?

Ans. I don't know hardly; I suppose the tender is some the largest—widest.

Ques. Does the tender hang over the track?

Ans. Yes, sir.

Ques. How much wider is the body of the tender than the track?

Ans. I suppose from 8 to 9 inches.

Ques. On each side?

Ans. Yes, sir.

Ques. If that was the case, and there was two tenders passed over, and the tenders hang over 8 or 9 inches over the rails, and the distance between the two tracks was 40 inches, what space would there be there to operate this switch?

Ans. A man couldn't work that switch.

102 Ques. Could this switch be used at all under such circumstances?

Ans. No, sir; I think not.

SARAH RANDALL, called for the plaintiff, sworn, testified as follows:

Direct examinaination by Mr. DOVENER:

Ques. What relation are you to the plaintiff in this case?

Ans. I am his mother.

Ques. How old is he now?

Ans. He will be 30 on the 13th day of March—I think that is it.

Ques. Did you see him in Grafton on or about the 23d of March, 1874?

Ans. Yes, sir; I did.

Ques. When did you last see him before that?

Ans. I saw him on the evening before.

Ques. Sunday evening before?

Ans. Yes, sir.

Ques. When he left home?

Ans. Yes, sir.

Ques. Was he in his usual health at that time when he left home?

Ans. Yes, sir; he fared well.

Ques. What were his circumstances financially at that time, as to being well off?

Ans. Oh, he had nothing only what he worked for.

103 Ques. When did you see him, on the 23d of March?

Ans. I saw him in a room at the Powell House.

Ques. In what town?

Ans. Grafton.

Ques. How did you come to go there to see him?

Ans. They sent for me to come that morning after he was hurt at night.

Ques. What condition did you find him in at the time you got there, as to being different than when he left home?

Ans. He was laying on a lounge in a doze, asleep like.

Ques. Have all his limbs about him; any of his limbs off, or anything? Did you wait on him during his sickness?

Ans. Yes, sir.

Ques. How long did he need the care and attention of a nurse?

Ans. I was there 8 weeks.

Ques. How long at home?

Ans. Well, I suppose—well, several weeks I had to take care of him. I didn't keep the time as correct as if I had been away from home, but it was some time before he could walk.

Ques. This Mrs. Powell kept a boarding house in Grafton, did she?

Ans. Yes, sir.

104 Ques. During that time state what was the character of his sickness or ailements, if anything, and what evidence he gave of suffering or pain.

Ans. He appeared to suffer a great deal from the bruise, more so I thought than from the amputation of his leg; the other was very bad though.

Ques. Do you know anything about whether duri'g that time his mind was perfectly clear?

Ans. By times he seemed to be pretty clear in his mind; at other times he was quite flighty, particularly of nights he would imagin; the trains were coming on him; we had to quiet him the best we could.

Ques. Did you treet him as a nurse for that bruise, attend to applying the lotions?

Ans. Yes, sir.

Ques. Did you follow the doctor's directions explicitly?

Ans. I did as near as I could.

Ques. Do you know whether he was treated by physicians or not, after he came home?

Ans. Yes, sir; I do.

Ques. What physicians attended him when he came?

Ans. We called Dr. Ogden and Dr. Courtney.

Ques. Do you know what it was necessary for Drs. Ogden and Courtney to do, after he came down there?

Ans. He examined where it was cut off; it was never healed; there was

one place wouldn't heal. Dr. Ogden examined and found a little
105 loose bone, and took that out and lanced the bruised place a couple of times.

Ques. After he got home?

Ans. Yes, sir.

Ques. What bruises did you discover on the body, besides the bruise on the hip?

Ans. His other hip was bruised, turned very dark; small cut on his head here (indicating), and one on his eye; besides his left hip was very badly bruised, and the other turned kind of dark.

Ques. State whether or not this young man has been able to follow the business and vocation that he was in there.

Ans. He can do some things.

Ques. I mean what he was at at the time?

Ans. He helps a little about, hoeing corn.

Ques. He was railroading at the time this happened. Has he been able to perform labor of that kind since?

Ans. No, he was in the service of the railroad as brakeman, I understood him.

Ques. Has he been able to perform that service since this accident?

Ans. Oh, no; he couldn't do that at all.

Ques. What family had this man (indicating plaintiff) at that time to support, if any, at the time this accident happened?

106 Ans. He was working to help me and his pap. Well, it's no difference; he went out to get some money to help rent a piece of land.

(No cross-examination of witness by defendant's counsel.)

CHARLES MARTIN recalled for further cross-examination by Mr. Hutchinson.

Ques. Are you a relative of the plaintiff Randall?

Ans. I don't know whether I am or not.

Plaintiff rests in chief.

I. W. HAMILTON, called for defendant, previously sworn, testified as follows:

Direct examination by Mr. HUTCHINSON.

Ques. Where were you and what was your business in March, 1874?

Ans. I was assistant agent at Grafton.

Ques. For the defendant?

Ans. Yes, sir.

Ques. How long had you been at Grafton?

Ans. 1867 I went to Grafton in that situation.

Ques. Were you acquainted with the tracks on the main stem and the intersection of the Parkersburg branch track at Grafton?

Ans. Yes, sir; all of them.

107 Ques. Did you know them on the night of the 22d of March—the location of the switch on the main stem, referred to by the plaintiff Randall in his testimony?

Ans. Yes, sir.

Ques. I wish you would describe to the jury the location of that first

switch he says he opened, and the one he says he was trying to open when this accident occurred.

(Diagram of tracks handed to witness.)

By Mr. DOVENER:

Ques. Did you make that map?

Ans. No, sir.

By the COURT:

Ques. Have you examined the map and do you know it to be correctly diagram'ed?

Ans. As far as it goes to cover that switch; the first switch is not laid down there.

Ques. How far is that west of the Grafton House?

Ans. I judge it must be some—I expect it must be 900 feet west of the Grafton House.

By Mr. HUTCHINSON:

Ques. I want you to describe to the jury that switch located 900 feet west of the Grafton House; what kind of a switch it is?

Ans. Same kind of a switch where they went out in.

Ques. How long had it been there?

Ans. 13 years to my knowledge.

Ques. What do you call it?

108 Ans. Ground-lever switch.

Ques. Same kind of a switch at which he says he was injured?

Ans. Same kind of a switch.

Ques. Opened the same way?

Ans. The same way.

Ques. Operated the same way?

Ans. The same way.

By the COURT:

Ques. Tell us what kind of a switch it is.

Ans. Ground switch; ground-lever lays down out of the way.

Ques. Tell us whether that switch is attached to the cross-ties or whatever it rests upon, in the same way which the switch is at which the accident occurred.

Ans. It is fastened to the ties. Yes, sir.

Ques. How is it fastened to the ties?

Ans. It is set right this way (indicating). If throwed one way it will open the switch, and the other way it will close it.

By Mr. HUTCHINSON:

Ques. Describe how the one at which Randall was injured was operated.

Ans. In the same way.

Ques. What is the length of that lever?

Ans. 24 inches.

109 Ques. Tell the jury the distance between the two tracks at which this switch is located.

Ans. I reckon it's 6 feet, sir.

Ques. At the time of the accident?

Ans. Six feet, I believe, sir, is what they are intended to be, and I judge so at that time; I didn't measure it; that was the understanding in the yard; that is my recollection.

By the COURT:

Ques. From your recollection or your examination of it?

Ans. Yes, sir; that is my recollection of it.

Ques. I understood you to say a moment ago that the switch is there still.

Ans. The same kind of a switch is there.

Ques. Is the same kind and character of switch there that was then?

Ans. Yes, sir.

Ques. Same kind and character used there now as was then?

Ans. Yes, sir.

Ques. Has there been any alterations in the tracks? Have they been changed in such a way that would require an alteration in the switch?

Ans. No, sir; not materially.

Ques. Have they been materially altered?

Ans. No, sir.

By Mr. HUTCHINSON:

Ques. Between what tracks was this switch located?

Ans. Between the main track and what we call No. 1.

110 Ques. What do you call No. 1?

Ans. The track leading through the yard from the east end, and intersecting with the main track this side of where this switch is, comes in at another switch.

Ques. Had you before this accident been at this switch when trains were passing?

Ans. Yes, sir.

Ques. Frequently?

(Objected to.)

Ans. I had all chances to know; dispatched trains for two or three years.

Ques. Tell the jury, from your knowledge of that switch, its use, whether there was sufficient room there for the operation of that switch by brakemen, or any one else operating it.

Ans. Yes, sir; I should think so.

Ques. Was there room the night Randall was hurt handling that switch, using ordinary care, to avoid passing locomotives or tenders on either track?

(Objected to by Mr. Dovener; objection overruled; exception.)

Ans. There was, sir, no occasion for him to get on the other track.

By Mr. DOVENER: I move to strike out the interjections of witness, voluntarily made, inferring Mr. Randall got on that track.

(Motion denied by the court; exception.)

111 Ques. Now state, from you' knowledge of the location of that switch, and the distance between the two tracks, and the manner in which it is operated, is there any neces'ity for Mr. Randall getting down upon either track in opening or closing that switch?

(Objected to.)

By the COURT:

Ques. The question should be, was there any neces'ity for any employee of the road, in operating or opening that switch, to put himself upon the track, upon any track over which a locomotive or train might go?

Ans. Well, that would be just with himself; if he seen fit he could turn the switch either way without getting on the other track, if he was to do so.

By Mr. HUTCHINSON:

Ques. Could that switch have been operated by Randall, or any other brakeman, at the place in which it is located, without coming in contact with any passing train on either track, or locomotive?

Ans. Yes, sir; it can be done.

Ques. Could it be safely operated by him under such circumstances?

Ans. If a man is careful; yes, sir.

By the COURT:

Ques. All your evidence must be refer'able to the time this accident took place.

Ans. That is what I am referring to.

112 By Mr. HUTCHINSON:

Ques. Could the train in which Randall says he was brakeman that night have got upon that track from which he was endeavoring to switch at the time of the accident without his having opened this first switch which you have alluded to?

Ans. No, sir; he couldn't have got on that track without opening the switch.

Ques. It was a ground lever?

Ans. Yes, sir, ground switch; separate and distinct from the others.

And the court took a recess until two o'clock p. m.

AFTERNOON SESSION.

I. H. Hamilton resumed the stand, and was further examined by Mr. Hutchinson.

Ques. Were you in Grafton the night of this alleged accident?

Ans. I was.

Ques. How soon after the accident did you see Randall, or go to the place of the accident?

Ans. I reckon it was an half hour, more likely, when I was notified of the accident.

Ques. Did you see him at or near the switch?

Ans. No, sir; I didn't see him until he was at the house—Mrs. Powell's.

113 Ques. I wish you to tell the jury if you are acquainted with the way in which the tracks of the company east of the platform around the Grafton Hotel are located.

Ans. Which track have you reference to?

Ques. I say the tracks—entire series of tracks.

Ans. Well, I don't know whether I can explain that without reference to something.

Ques. I say, are you acquainted?

Ans. I am acquainted with all the tracks.

Ques. Will you tell the jury whether or not there was any crossing for the public or used by the public at the place where this switch was located?

Ans. There was no crossing there, sir.

Ques. Tell the jury whether there was any street, alley, or other means of communication with the town of Grafton on the north side of the railroad tracks with any such alleged public crossing near the place of this accident.

Ans. Well, no, sir; there was not. I can explain where there is such a place.

Ques. Just explain.

Ans. At that time, and I think there is yet, two pair of steps. There was 2 or 3 steps going up—one to the Valley House, private steps put there by the parties themselves, one in front of Dr. Thayer's drug-store, and one in front of Mr. Grosvenor's.

114 By Mr. DAVENPORT:

Ques. Is it the one occupied now as a hotel?

Ans. Mr. Hickman's; yes, sir.

By Mr. HUTCHINSON:

Ques. Were those public or private stairways?

Ans. Private, sir.

Ques. What means of communication with the southern part of town was there for the people from the northern part of the town; that is to say, on the bluff? What public means?

Ans. Bridge there for that purpose.

Ques. Describe to the jury where that bridge is located; just stand up there and show the jury (handing witness map or diagram). Tell the jury where that was located.

Ans. Well, I don't know whether I can explain from this satisfactorily, from the fact the hotel is not laid down.

Ques. Tell the jury where that bridge is located.

Ans. That bridge is laid down. This is the east end of the pavement; here comes the Parkersburg trains; right here is the Grafton House; from the upper end of this platform this bridge goes over and connects with the streets going to town.

Ques. At the time of this accident at the place where this wit-
115 ness Laughlin speaks of, tell the jury whether there was any public alley or street connecting that stairway.

Ans. I don't know what stairway he was at.

Ques. Was there any public street or alley connecting with any of those stairways?

Ans. Not immediately.

Ques. At the upper stairway was there?

Ans. At the one way, about one building out to the corner there is a private alley running up.

Ques. My question was, was there any public street or public alley?

Ans. Well, it's an alley given them by the citizens. Whether you call it a public alley or what, I don't know; the land belongs to the owners there; it is not bound to be there; it can be closed up.

Ques. Tell where that alley is.

Ans. That was east of the steps that goes up to the Valley House. I suppose some 50 feet, likely, to where that alley comes down east.

Ques. Tell the jury how the people in that part of town communicate with the southern part of town. Whether or not there is a board walk lying in front of these houses.

Ans. There are, sir.

Ques. Was it there at that time?

Ans. Yes, sir.

116 Ques. Tell the jury whether or not, at the time of this accident and before, the people used as a public crossing that part of the railroad track or yard, where this switch was located?

(Objected to as leading.)

By the COURT:

Ques. State if there is any public highway there or crossing, or whether the public use it as a crossing; and, if so, at what point anywhere near this.

Ans. It was not used as a public crossing. I am speaking from that ground switch; there is no public crossing there.

By Mr. HUTCHINSON:

Ques. Then you say there is no public crossing there?

Ans. There is not, sir.

Ques. What was on the south side of the railroad tracks out beyond where the tracks were located?

Ans. Upon the south side?

Ques. Tell the jury whether there was any buildings or residences or public places used by the citizens in this part between the track and the river.

Ans. All company's property; tracks laid all along there.

Ques. What buildings?

By the COURT:

117 Ques. State who occupies the ground between the track where this accident occurred and the river. Who is in possession of it and occupies it?

Ans. The company were in possession of it, and their tracks are all upon it.

By Mr. HUTCHINSON:

Ques. Take that map and tell the jury, as regards the place where this accident occurred, where the round house and machine shops of the company are located; on which side of the tracks, on the north or the south; where the accident occurred.

Ans. Here's supposed to be the switch; round-house lays of' on the south side, and there is a string along here machine shops and buildings all along the yard.

Ques. How far out?

Ans. They run north of the upper end of the upper crossing. I suppose 300 yards—in the neighborhood of it.

Ques. State how far this public bridge, at the east end of the platform of the Grafton House, is this switch.

Ans. About 125 or 30 feet; somewheres in there, I think.
Ques. Have you measured it?
Ans. Never did, sir; no, sir.
Ques. I ask you if that statement was made from measurement?
Ans. It was not; I never measured it.

Cross-examination by Mr. DOVENER:

Ques. What did I understand your position to be?
118 Ans. At that time I was assistant agent there.
Ques. What is assistant agent; what is his duty?
Ans. At night.
Ques. Who was agent?
Ans. Mr. Adair.
Ques. Whose business was it to look after this switch and repair it?
Ans. Mr. Benjamin Berry.
Ques. Where is he.
Ans. Here in the court room.
Ques. Which is the gentleman?
Ans. Sitting back yonder next to the window.
Ques. What is his duties?
Ans. His duty is supervisor of the track, He has a division.
Ques. How long had that switch been there at that time?
Ans. That I cannot say, sir.
Ques. About how long?
Ans. I can tell you how long I knowed it to be there.
Ques. Well, how long?
Ans. I knowed it to be there from 1867 to 1874.
Ques. Seven years in precisely the same situation?
Ans. Same situation; yes, sir; unless it might have been removed—altered—in repairing, an inch or so.
Ques. Do you know where this man was hurt, of your own knowledge?
Ans. No, sir.
119 Ques. Where did you get that from?
Ans. They said it was at that switch.
Ques. And you are testifying from what you heard; haven't you been telling all about the place where you say this man was hurt, and what he could have done, all this from hearsay?
Ans. I don't know that I have, sir.
Ques. Didn't you say awhile ago Okey Randall could have opened that switch where he was hurt?
Ans. Where they said he was hurt.
Ques. Isn't that hearsay?
Ans. As far as being hurt there, I don't know he was hurt there.
Ques. You didn't know he was hurt for half an hour afterwards?
Ans. I did not.
Ques. When you did hear it did you go and look at the switch?
Ans. No, sir.
Ques. Had Mr. Randall shown you where he was hurt?
Ans. No, sir.
Ques. Any one show it?
Ans. No.
Ques. How did you know it was there?

Ans. No one saw it.

Ques. How do you know?

Ans. It has never been proved here; I never heard a man say he did see it.

120 Ques. Was you in court and heard Mr. Randall swear about it?

Ans. He did himself.

Ques. And Mr. Laughlin?

Ans. Yes, sir.

Ques. And another witness, Martin, didn't you?

Ans. Yes, sir.

Ques. And you haven't heard any one yet say he was hurt. I understood you to say there is no one lives on the south side of that track.

Ans. Not between there and the creek.

Ques. There is some one lives beyond the creek?

Ans. Yes, sir.

Ques. How would they get in East Grafton?

Ans. They go across that bridge.

Ques. Do they all go across that bridge, or do they use other ways; go up that alley; what do they do?

Ans. They go right across the pavement, and then they strike across the bridge.

Ques. Where is the court-house in that town?

Ans. None there.

Ques. The one occupied as a court-house?

(Objected to.)

Ques. How long has that bridge been there which you speak of?

Ans. I can't answer that question.

By the COURT:

Ques. Was it there when this transaction occurred?

121 Ans. It was, sir.

Ques. (By the Court.) You say you are acquainted with the switches and location of the main stem?

Ans. Yes, sir; and branches in the Grafton yard.

Ques. There is one main track coming from Parkersburg crossing the Valley River and running along the south side of the Grafton House?

Ans. Yes, sir.

Ques. Another coming from Wheeling running on the north side?

Ans. Yes, sir.

Ques. They join immediately east of the Grafton House, don't they?

Ans. Yes, sir.

Ques. Before that track of the Northwestern road joins the main track from Wheeling, and after passing over the bridge, are there not one or two side tracks leading off?

Ans. Yes, sir.

Ques. And running parallel?

Ans. Yes, sir; without coming to the main track.

Ques. I want to know if the trains are not directed that come from Parkersburg to pull their trains on this side track, with the engine east?

Ans. Upon which side track?

Ques. Running from the Parkersburg branch after leaving the bridge?

Ans. They pull up.

122 Ques. After they have pulled up, then the engine leaves the train there and passes on and by a side switch gets on the main track?

Ans. Yes, sir.

Ques. And g' back to the main track with the tender first?

Ans. No, sir; not then nor yet.

Ques. Where do they go?

Ans. Down the side track.

Ques. Which side track?

Ans. The side track there at that time.

Ques. If an engine from the Parkersburg branch should have got on the main track north of the Grafton House, it was out of place?

Ans. It was; it don't go down the main track.

Ques. What did they come down?

Ans. Side track on the left side of the Grafton House. Before they come to the Grafton House they get to the main track east of that on the side track. The side track goes east of the platform.

Ques. (Map shown witness.)

WITNESS. You have got a south track laid down here. There was no south track laid there at that time.

Ques. Do I understand you to say since this accident happened there has been another track added on the north side of the Grafton House, between the old main track and the Grafton House?

123 Ans. No, sir. There was only a single track through the yard at that time; now there is a double track.

Ques. Where is that?

Ans. Not on here.

Ques. Was it there at that time?

Ans. No, sir.

Ques. Then it don't need to be there?

Ans. No, sir. You have got it laid down south track in that?

Ques. Where?

Ans. Right here (indicating on map); this is the main track.

Ques. Don't you see it is called main track there?

Ans. That should be main track clear through.

Ques. We will call that main track.

Ans. Well.

Ques. When the train comes in from Parkersburg here with a train of cars, they pull on to a side track up here?

Ans. They pull up track number four, south of this main track.

Ques. One of these tracks here?

Ans. Yes, sir.

Ques. And then cut loose; how does that engine get back to this engine-house?

Ans. Goes down here to the switch running across, and they all point out to one track.

Ques. Then you get in on to this main track?

124 Ans. Not on to number one, but it comes down here somewhere, if they went into the main track before it comes to the Grafton House, then took the main track and went to the Y.

Ques. What position was the engine in; was it ahead or behind the tender?

Ans. Tender foremost.

Ques. At that time was there any bells on your locomotive engines?

Ans. I think not, sir; not our freight engines.

Ques. Was there any bell on 329?

Ans. I don't know; I couldn't say. I don't think there was any on any of our freight engines. I don't remember of there being any.

Ques. You told Mr. Hutchinson the switch Mr. Randall went in at?

Ans. Yes, sir.

Ques. And that was a ground switch?

Ans. Yes, sir.

Ques. How do you know that is the switch Mr. Randall went in at?

Ans. He couldn't get on that track by any other switch.

Ques. Couldn't he have gone on up the main stem and backed in the other end?

Ans. Yes, sir.

Ques. What did you mean; he couldn't go in any other way?

Ans. He couldn't at the west end.

Ques. Was you asked the west end?

125 Ans. Yes, sir.

Ques. Didn't you give as a reason why he went in, because he couldn't get in any other switch? Now you say the question was asked the west end, and you answer with that view.

Ans. That was my understanding.

Ques. How far apart did you say the north rail of the main track to the south rail of this switch at the east end, where this accident happened, was apart?

Ans. Six feet.

Ques. And I understand you to say a man could lock and unlock that switch with perfect safety?

Ans. That there would be room there for him, but he couldn't turn when a train was passing.

Ques. Now, then, if you had gone there and was engaged in unlocking that switch, wouldn't you be in a position if there was no signal, and you had no reason to believe and didn't know a train was coming, that it would strike you, no bell or whistle sounded, wouldn't you be in a position while unlocking that you would be struck?

Ans. No, sir; I think not.

Ques. Well, let us see; you say this is six feet apart (indicating)?

Ans. Yes, sir.

126 Ques. Allow it to be six feet; you would stand within a space of 3?

Ans. Yes, sir.

Ques. And do you tell this jury that you can stand in a box 3 feet wide and unlock a switch in the bottom? If you were undertaking to open that switch you would stand on the north side of the switch ball?

Ans. Between the two tracks.

Ques. On the north side of the switch?

Ans. If the switch was on that side.

Ques. Wouldn't it be on that side if you were going to open it?

Ans. Yes, sir.

Ques. You would stand there?

Ans. Yes, sir; on the north side of what track?

Ques. The place where you say Randall got hurt.

Ans. The switch is on the south side of that track.

Ques. Tell the jury what position you would take with respect to that ball.

Ans. I didn't say I could open it when two trains were passing?

Ques. I am a conductor; I send you to open that switch; tell the jury what position you would take to insert the key in that lock.

By the COURT:

Ques. You have heard Randall's evidence?

Ans. Yes, sir.

Ques. How he was directed to open that switch. Put yourself
127 in the shoes of Mr. Randall, and you are directed by the conductor of that train Mr. Randall was brakeman on to go there and open that switch to let his train through. What position would you take to open that switch, as a prudential man, having regard to your protection?

Ans. I would just go to it, unlock it, raise it up, and throw it down on the other side.

By Mr. DOVENER:

Ques. Where would you stand?

Ans. Right between the tracks.

Ques. What part between the tracks?

Ans. Between the two tracks; the ball crosses between the two tracks. I would raise it up and throw it down one way to open it, and the other way to close it (indicating).

Ques. There sets that switch (indicating)?

Ans. Yes, sir.

Ques. And it is how long—lever?

Ans. About 24 to 26 inches.

Ques. When it is not open it runs about there (indicating)?

Ans. It may come somewheres near that.

Ques. Whereabouts on that lever is that lock; is it back here or out to the end?

Ans. Somewheres up here (indicating).

Ques. Show me the position you would take.

Ans. I would go to it and unlock it, raise it up, and put your foot on it, and throw it down (indicating position and manner of operating switch).

128 Ques. With that short lever you will stand sideways and lift that up, bending t'o immense rails? I want to ask you if the usual and customary habit of your trains is not to come here and throw it that way (indicating)?

Ans. No, sir, it is not.

Ques. Who did you ever see open it in the way you describe it? Mention a man.

Ans. I have seen it done; don't know that I can mention the man.

Ques You know some of the men?

Ans. Yes, sir.

Ques. Do you know any one who ever operated it in that way?

Ans. I don't know that I can mention the man who did it in that way.

Ques. Did you?

Ans. I have.

Ques. When?

Ans. When I was braking on the 3d division, years ago—15 years ago.

Ques. That switch?

Ans. Same kind of a switch.

Ques. I am speaking of a switch situated as that was.

Ans. That's what I am speaking of.

Ques. What switch did you ever know of situated in the same place and in the same way?

129 Ans. Plenty of them, same kind of a switch.

Ques. Same kind of a switch, situated in the same kind of a place?

Ans. I don't know that I ever did that.

Ques. With a two-foot ball and a six-foot space between the tracks?

Ans. They have another in Grafton.

Ques. I mean the same pattern, situated as this one was in that peculiar place.

Ans. You might hunt a good while before you would find the situation like that.

Ques. An upright switch with a lever on it is much easier moved?

Ans. The high levers are harder to move.

Ques. Then the longer the lever the harder to move the switch, is that it?

Ans. I say they are harder to move.

Ques. Any difficulty in moving them?

Ans. Takes a pretty hard pull.

Ques. You don't move them this way (indicating)?

Ans. No. You can get behind them and you can get in front and push.

Ques. These little fellows, all you have to do is to flip them over right and left?

Ans. I didn't say that.

Ques. Why are they easier?

Ans. I couldn't say.

Ques. Are the rails any weaker?

130 Ans. No, sir; the leverage is better on the switch, the fulcrum works easier on the ground switch than on the high switch.

Ques. And the length of the lever has nothing to do with the ease of the load to be raised?

Ans. I can't say that.

Ques. What is the fulcrum?

Ans. When it is connected down at the ground, works through to the ball, and slips the rail.

Ques. That's the fulcrum, is it?

Ans. I may be mistaken.

Ques. Isn't the fulcrum the pivot upon which the lever works?

Ans That may be; I am no mechanic.

Ques. How did you ascertain these long levers were harder to work than short ones?

Ans. I have seen them work.

Ques. And you can tell them by looking?

Ans. Yes, sir; I am speaking from what I know and see; I never tried it.

Ques. How did you ascertain?

Ans. I sometimes judge circumstances myself.

Ques. And in judging this you observed the longer the lever was the harder it was to switch?

Ans. Yes, sir.

Ques. These long levers you can stand up, can't you, and work them, and look around at the same time?

131 Ans. You don't find these switches in that yard.

Ques. Don't the long lever present this advantage, so far as safety is concerned, that the party working it has an advantage of using his eyes, and looking around?

(Objected to by Mr. Hutchinson.)

Ques. I desire to ask you if it is not possible to work a long lever there at that place?

Ans. No, sir; you can't.

Ques. If, by extending the base to which the lever is attached simply to the left 10, 12, 15 or 20 feet, or outside of that track, it couldn't work?

Ans. That might interfere with some other switch; there is other switches there.

Ques. How many tracks are on the north of that; but two tracks, isn't there?

Ans. 2 or 3.

Ques. Don't you know only two?

Ans. Maybe two.

Ques. What is the width of these tracks?

Ans. Five ten.

Ques. If you double that, make 12 feet of a lever there, couldn't a man standing outside of either one of these tracks work it without any interference of any locomotive?

Ans. Yes, sir, certainly.

Ques. He wouldn't be in any danger of being run over then?

132 Ans. Not if he stayed on the outside of the tracks.

Ques. Then wouldn't it be safter than the one you speak of?

Ans. Yes, sir; very likely it would.

Ques. Did you ascertain that night who caused this accident; the cause of this accident?

Ans. I learned what they said was the cause of it. I didn't see it.

Ques. Who did you get your information from?

Ans. Some of the train men.

Ques. Couldn't recollect that man's name?

Ans. No; I don't know that I do.

Ques. Haven't you got a wonderful recollection of some things?

Ans. Yes, sir.

Ques. How does it come you don't know any of the people out there at Grafton?

Ans. I don't know.

Ques. Who was it showed you where he went in—where this accident happened?

Ans. No person.

Ques. How soon, after the accident was said to have happened, was you shown the place?

Ans. I wasn't shown the place.

Ques. How soon afterwards were you told where it happened?

Ans. I stated that a while ago.

Ques. What did you say?

133 Ans. I said about an half an hour.

Ques. Who told you that?

Ans. I can't say who it was.

Ques. Did you go to see Mr. Randall?

Ans. I did after he was taken to the house; yes, sir.

Ques. 300 yards west of the Grafton House how many tracks are there running parallel with each other, at that time?

Ans. I reckon there were 4, sir.

Ques. Are you certain about that?

Ans. I may not be.

Ques. How many switch balls are in that direction?

Ans. I think only two, sir; that is, leading from the main track.

Ques. Where were those two located?

Ans. One located west end of the old main track and the other was at No. one.

Ques. What kind of a switch was No. 1?

Ans. High ball.

Ques. How did you know Randall didn't go in that one?

Ans. H' couldn't go off the old main track.

Ques. What does No. 1 go out on?

Ans. Where he did go out.

Ques. What does No. 1 switch from the main track into, going east?

Ans. Switches on the main track.

Ques. Where from?

134 Ans. From the west end.

Ques. Couldn't the train back in on that?

Ans. Oh, yes, sir.

Ques. Couldn't the train go up there and back right in there on to that second track?

Ans. Not if he pulled in at the west end.

Ques. Suppose he backed in to the west end?

Ans. Couldn't.

Ques. What was that No. 1 for?

Ans. Pull in at.

Ques. Couldn't Randall have pulled in there?

Ans. Certainly.

Ques. That's a high ball?

Ans. Yes, sir.

Ques. How far is that away from the Grafton House?

Ans. That is some little further distance than No. 2.

Ques. And is the first ball as you come from Wheeling?

Ans. Not now it aint; it was then, I think.

Ques. You say this public crossing where the bridge is, there was about 125 or '30 feet below the place of the accident?

Ans. Yes, sir; rough estimate, don't know whether it is correct or not; never measured it.

Ques. And there were 3 other crossings there, but you call them private crossings?

Ans. I said steps.

Ques. What were they for?

Ans. People to go up and down.

135 Ques. Well, did they go like the French army—up the hill and down again—or cross over?

Ans. Crossed over; they were private; the parties put them there that owned the buildings.

Ques. Do you know that?

Ans. I do, sir.

Ques. Who put up the one in front of the Globe House?

Ans. I don't know the workmen; I know the parties had it done.

Ques. When was they put up?

Ans. I don't know.

Ques. Who are the parties own those buildings?

Ans. Dr. Thayer and Grossman and Co.

Ques. Does he own the Valley House?

Ans. No, sir; Mr. Hickman owns it, I think.

Ques. Wasn't they up there before the war?

Ans. They might have been.

Ques. They were there when you came there?

Ans. They were there; they were new steps; the others rotted down; I don't know who put the first steps up.

Ques. This alley which comes down nearly opposite this point, where this man was hurt, you say is about 50 feet above?

Ans. Some where near that—50 or 60 feet.

Ques. That is used by the town of Grafton—by the citizens passing through and forth?

Ans. Yes; men going to the shops.

136 Ques. And other parties?

Ans. Yes, I suppose once in awhile.

Ques. Is it only once in awhile?

Ans. Yes, sir.

Ques. Have you made it a business to observe that thing?

Ans. Oh, no.

Ques. Right at this point and above the alley, isn't there a board walk running in the same direction as the railroad does?

Ans. Along in front of the company's buildings.

Ques. And also not in front of the company's buildings; I will show you where I mean. Assuming that to be the alley we are speaking off, I ask if right there there isn't a board walk running along the full length of that?

Ans. Here's where the alley goes up (indicating); here's the corner of the building; there's an open space out here, and here a lot of old stables and sheds (indicating).

Ques. There's the bridge going across?

Ans. Yes, sir.

Ques. There is a street, right there?

Ans. Yes, sir.

Ques. What is the next opening above that?

Ans. Another street above there.

Ques. What is the next opening towards the railroad; isn't there an alley near the Valley House?

137 Ans. Yes, sir; what do you call this?

Ques. That is the block back of the court-house; I located the court-house there, and the post-office there; now, sir, aint that alley west of the court-house?

Ans. Runs right up yes, sir.

Ques. There is buildings east of that alley?

Ans. Not on the railroad.

Ques. When you start up this street (indicating on map), and come to this alley west of the court-house and start down this alley, where do you come out?

Ans. At Hickman's.

Ques. Isn't there a board walk running on the back part of the lot parallel with the railroad back of the block of buildings where this court-house is situated?

Ans. There is not, sir.

Ques. No doubt about it?

Ans. I know there is no sign of a walk, and has not been; but up in front of the company's buildings there is; there is no walk around there.

Ques. What time are you talking about now—1874?

Ans. I don't think there ever was; at least I have no remembrance of ever seeing a walk there; don't think there ever was any; towards the bridge there is a walk; I don't think there ever was one there.

138 Ques. Do you know who put up that bridge across the track?

Ans. The wire bridge?

Ques. Yes, sir.

Ans. I do not.

Ques. The company didn't do that?

Ans. No, sir.

Ques. That is traveled publicly, isn't it?

Ans. Yes, sir.

Redirect examination by Mr. HUTCHINSON:

Ques. The wire bridge—is it anywhere near this crossing?

Ans. About opposite the other bridge, lower down yet than all the company's buildings.

Ques. Isn't it on the south side of the Grafton House?

Ans. Yes, sir.

Ques. Do you know that was put up there by the workmen in the shops of the company?

Ans. I couldn't say about that.

Ques. For their own use?

Ans. I couldn't say that.

Ques. You have talked about that high ball switch No. 1, west of the Grafton House; was it possible for Randall to get on the track on which his train was on the night of the 22d of March, 1874, in order for him to let it out at the switch he has alleged he was operating without having first passed through the ground switch west of the Grafton House?

139 Ans. No, sir; he could not.

Ques. Could he have got on that track by passing through the high ball switch?

Ans. No other way but come in the ground switch.

Ques. Coming from towards Wheeling, without backing in there, could he get in by pulling through?

Ans. No, sir.

ALEXANDER ZECK, called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Mr. Zeck, where were you on the night of the 22d of March, 1874?

Ans. Grafton.

Ques. What employment?

Ans. Engineer, locomotive engineer.

Ques. For what company?

Ans. Baltimore and Ohio.

Ques. What train were you running, pulling that night?

Ans. Freight train No. 31, I believe.

Ques. Where from?

Ans. Wheeling to Grafton.

Ques. Did you see anything of Randall that night?

Ans. I saw the brakeman; I don't know whether it was Randall or who it was.

Ques. Who was your conductor?

Ans. Mr. Jasper.

140 Ques. Will you tell the jury what time you arrived at Grafton that night?

Ans. I think between 9 and 10 o'clock, probably about 9.

Ques. Where did you leave the main track after you pulled up before entering Grafton yard?

Ans. Well, about 75 or 100 yards west of the Grafton House.

Ques. What switch was opened for you to enter?

Ans. Switch leading to what the' call the old main track.

Ques. What kind of a switch?

Ans. What they call a ground switch.

Ques. Did you see the man open that switch to let you in?

Ans. I did.

Ques. Who was it?

Ans. I don't know; it is said to be Mr. Randall.

Ques. Was it the man acting as brakeman on that train?

Ans. Yes, sir.

Ques. You were let in there and went onto that old main track?

Ans. Yes, sir.

Ques. How did you get onto that?

Ans. I went out to the switch leading to the main track.

Ques. What switch?

141 Ans. Where this accident is said to have occurred—ground switch.

Ques. Who unlocked it?

Ans. The brakeman.

Ques. The same person?

Ans. The same person, I believe.

Ques. After the opening of the upper switch, the place of this alleged

accident, tell the jury what you did with your train or locomotive and tender.

Ans. To the best of my recollection, I believe, I pulled out, or was pulling out, and was waiting for the brakeman to change the switch and back the cars off when the accident occurred.

Ques. Did you see the accident occur?

Ans. I did not.

Ques. How long had you been in the employ of the defendant before that time?

Ans. Well, about a year and 3 months—15 months.

Ques. Had you operated or seen operated those ground switches?

Ans. Yes, sir.

Ques. Had you operated and seen operated those two switches in the yard?

Ans. Saw them operated; yes, sir.

Ques. How often had you passed through this particular switch spoken of, where this accident is said to have occurred?

142 Ans. Very often, I couldn't tell how many times, probably 200 times a year.

Ques. Were you acquainted with that switch and the mode in which it was operated?

Ans. I was.

Ques. Can you tell the jury how it was used and worked by those whose business it was to lock and unlock it?

Ans. They generally stoop down and unlock it and throw it off.

Ques. Tell the jury whether in operating that switch in the place it was between those t'o tracks it was necessary for the brakeman to get upon one side next to one track or the other in order to do it.

Ans. I suppose the switch could be turned by standing in the middle of the track; you have as much leverage one way as the other.

Ques. Was it necessary for the purpose of operating that switch at the place it was located, for the brakeman to get on one side or the other, between the switch and the track?

Ans. I never operated the switch.

Ques. You have seen it operated?

Ans. Yes, sir; switch works very easy; you could stand any place; if hard to work you would have to brace yourself.

Ques. Do you know the diameter of the fulcrum?

Ans. To the connecting-rod?

Ques. Yes, sir.

143 Ans. About 6 inches.

Ques. What was the size of that fulcrum in that switch?

Ans. I suppose about an inch and half or inch and a quarter bolt.

By Mr. DAVENPORT:

Ques. How long is the arm?

Ans. Some 15 to 18 inches, more or less.

By Mr HUTCHINSON:

Ques. You passed through there, I believe you said, about 200 times a year; did that answer the purpose for which it was intended?

Ans. Yes, sir; never had an accident I know of.

Ques. Was it suited to the purpose of those men to shift their trains with?

Ans. Yes, sir.

By the COURT:

Ques. Did you ever work on any other road?

Ans. Yes, sir.

Ques. Before you came to this road?

Ans. Yes, sir.

Ques. What road?

Ans. Pennsylvania Central and Allegheny Valley.

Ques. How long did you work at them?

Ans. The 5 or 6 years previous to that; I had been railroading all the time.

Ques. Ever see any switch like this on any other railroad?

Ans. I don't think I did. I saw switches work on the same principle but nothing constructed on the same style.

144 Ques. Ground switch.

Ans. I don't think I ever saw a ground switch like that before I came here.

Ques. Ever see any ground switch before you came to this road?

Ans. I don't think I did, I have no recollection of seeing any.

Cross-examination by Mr. DOVENER:

Ques. Well, sir; from the position in which this ground switch was in, taking into consideration the close proximity of the two tracks there, and the frequence with which engines pass up and down, and the whole surroundings of that yard, state whether in your judgement that was a safe switch or not.

Ans. I think the switch in itself was as sase as the ordinary switch.

Ques. Well, considering the place it was in?

Ans. I don't think it would be very safe to undertake to throw the switch while there would be two trains passing.

Ques. You say it might be worked by a man standing in the centre?

Ans. I did.

Ques. How was it usually worked?

Ans. I could hardly tell, I never paid particular attention.

145 Ques. Didn't the parties go to one side or the other where the ball was, and work it?

Ans. I never seen it work that way.

Ques. Have you ever seen a man stand in the centre and work it that way (indicating)?

Ans. I think I have.

Ques. Since this accident?

Ans. I don't know.

Ques. Had you ever seen it before that?

Ans. If I saw it afterwards very likely I saw it before.

Ques. You are not certain of that?

Ans. No, sir.

Ques. Will you state whether that represents a picture, a reasonable representation, of the yard at Grafton then, and tracks?

Ans. I think it does.

Ques. Will you point out on this map about the point where this accident happened?

Ans. In here where this switch is.

Ques. About where that dot is?

Ans. Yes, sir.

Ques. At that point about what is the distance between the rails; ever measure?

Ans. Never did; the regular distance is six feet.

Ques. That is between tracks?

Ans. Yes, sir; it may be less than that; I don't know how close the switch is to the frog.

146 Ques. A locomotive and tender projects over the carriage, dosne't it, some?

Ans. Yes, sir.

Ques. About what distance?

Ans. 8 to 10 inches.

Ques. Then that would decrease the room in which a man would be at liberty to work or stand?

Ans. It would.

Ques. Supposing this table (indicat'g) and this bar (indicating) indicated the space between these tracks, and that (placing an object midway between the bar and table, a distance of about three feet from the table or bar) the centre, is there a post standing up here (indicating the object in the centre and about three feet from the table or bar)?

Ans. Not at that switch.

Ques. But there is a lever over here (indicating a point midway between the table and bar, a distance of about three feet from the table or bar)?

Ans. Yes, sir.

Ques. Can you stand behind that lever and reach over and unlock that switch?

Ans. You can unlock it and stand wherever it is convenient.

Ques. How long did you say that bar was?

Ans. 15 to 18 inches.

Ques. If it reached within four inches of the track it was 24?

147 Ans. Probcrably.

Ques. Suppose that (indicat'g object midway between table and bar) to be the place where the lever was, would you take your position there and unlock that, the lever lying down on the ground, or would you go over here (indicating the bar three feet from the centre)?

Ans. I would be apt to do it in this position (indicating).

Ques. While in that position, reaching over there, I want to know if an engine coming down there wouldn't be likely to bump you in that position?

Ans. I suppose it would.

Ques. Then you speak of throwing the bar behind it after it is unlocked?

Ans. Yes, sir.

Ques. You would necessarily have to squat down to unlock it, and set your lamp aside of you?

Ans. Yes, sir.

Ques. And if that was within 4 or 5 inches of the rail it would bring you very close to where the tender would be?

Ans. It would.

Ques. Point to the place where you and your train coming from Wheeling went in on that track.

Ans. Down here, west of the Grafton House.

Ques. That would be about 300 feet west?

148 Ans. I suppose it would.

Ques. Then you passed up to that place (indicating)?

Ans. Yes, sir.

Ques. And stopped there and he went ahead to open the ball?

Ans. Yes, sir.

Ques. When the accident happened there was a car coming down backward?

Ans. Yes, sir; an engine.

Ques. Where did that engine go?

Ans. Passed me.

Ques. About how fast was it passing you?

Ans. From 8 to 12 miles an hour.

Ques. You know something about the speed of engines?

Ans. Something.

Ques. That is your business, run'ing an engine?

Ans. It was.

Ques. I want to know if this track here (indicating) isn't used not only by the main division but the engines for the purpose of turning on this Y.

Ans. Yes, sir.

Ques. Then a switch in this point is more dangerous than some switches down below?

Ans. Yes, sir.

Ques. More dangerous position?

Ans. I think so.

Ques. Couldn't that switch be constructed and worked by an upright ball?

149 Ans. By working the switch ball some place else.

Ques. Where would you put the switch ball?

Ans. Out here (indicating outside of the tracks to the left).

Ques. Then there wouldn't be any danger of engines running over you?

Ans. No.

Ques. A brakeman could open that switch with equal facility, couldn't he?

Ans. I suppose he could.

Ques. You live in Grafton?

Ans. I do.

Ques. What is your business?

Ans. Merchant, in post-office building, Main street.

Ques. Is Main street laid down there (indicating map)?

Ans. Yes, sir.

Ques. Whereabouts, then, would be your place of residence on that map? You point it out, place of business.

Ans. About there (indicating).

Ques. West of you is there an alley passes down between and alley and the street that comes out opposite that bridge?

Ans. I believe there is an alley.

Ques. Have you passed down through there?

Ans. I have.

Ques. Do you know of citizens using it generally?

150 Ans. It is used occasionally by citizens.

Ques. Whereabouts would that alley go down. Aint the court-house below your place?

Ans. Yes, sir; here's an alley running down here (indicating).

Ques. I want to know if the east side of that alley running parallel with the railroad, there is not a board walk, or was?

Ans. There is a board walk, yes, sir.

Ques. Was there a board walk in 1874?

Ans. Same walk there, now, I believe that there was then.

Ques. Did you see any light on the tender of that engine?

Ans. Don't recollect, I was attending to my own.

Ques. Did you hear that engine blow any whistle or *blow* any bell?

Ans. No, sir.

Ques. Did you see any person manipulating that engine or working it?

Ans. I did not.

Ques. In backing that engine, if you was an engineer, which side of that engine would you stand on?

Ans. Right side.

Ques. Which side would Randall have been on from the engineer?

Ans. Left side.

By the COURT:

Ques. Couldn't you stand on any other side in handling the engine?

Ans. Not handily.

151 By Mr. DOVENER:

Ques. You say this bar was 2 inches; do you mean the pin that ran through the bar that worked it?

Ans. I said an inch and a half or an inch and a quarter, somewhere around there; I never measured that.

Ques. Was this in the corporate limits of Grafton?

Ans. If these tracks are I suppose these switches are.

Redirect examination by Mr. HUTCHINSON:

Ques. This all'y you speak of, is that the all'y known as the passageway down between the buildings from the court-house—from the direction of the court-house?

Ans. I don't know what it is known as.

Ques. Is that the all'y leads from the court-house, the passageway you showed Mr. Dovener? He said up here was the court-house.

Ans. He said in here (indicating).

Ques. Is the alley you refer to the all'yway or passageway leading from the court-house?

Ans. It runs down that way; an opening of some kind.

Ques. Is it an alley?

Ans. Yes, sir; an opening.

Ques. Isn't it a mere passageway between buildings? Isn't it very steep there from the track to the town?

152 Ans. Yes, sir.

Ques. Don't you go down there by a stairway?
Ans. I think I saw a team—cart—go down there.
Ques. Which end went down first?
Ans. From Main street.
Ques. This passageway, is it east or west from the court-house?
Ans. This passageway is west from the court-house.

By Mr. DAVENPORT:

Ques. Better passageway than the one leading on to the covered bridge?
Ans. I can't say it is any better.

W. R. JASPER called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Mr. Jasper, where were you on the night of the 22d of March, 1874?
Ans. I was in Grafton.
Ques. What was your employment?
Ans. Conductor.
Ques. What train?
Ans. On 36.
Ques. What train was it?
Ans. Freight train west; caboose and 2 cars, I believe; maybe only one car.
Ques. How far did you go west that day?
Ans. Farmington; changed there with the next conductor, of 21.
153 Ques. Of which Zeck was engineer?
Ans. Yes, sir.
Ques. Who came back from Farmington as brakeman?
Ans. Oakey Randall.
Ques. What time did you reach Grafton?
Ans. Between 8 and 9 o'clock.
Ques. Tell the jury where you first pulled up west of Grafton to enter the switch.
Ans. We pulled into the old main track.
Ques. What kind of a switch leads into the old main track?
Ans. Ground switch.
Ques. Was that the switch which Randall opened to let your train in?
Ans. Yes, sir.
Ques. Under whose direction did he do that?
Ans. My own.
Ques. Is this switch he opened that night similar to the one at which he is said to have been injured?
Ans. Yes, sir.
Ques. Work the same way and same lever?
Ans. Yes, sir.
Ques. Tell the jury how long you had been in the service of the company, and how long you had been acquainted with this switch previous to this accident.
Ans. About 3 years.
154 Ques. Had you used this switch yourself?
Ans. Yes, sir.
Ques. How often?

Ans. Every day or so.

By the COURT:

Ques. Was you a brakeman?
Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. Are those switches in use at Wheeling?
Ans. One.
Ques. Was Oakey Randall with you previous to this?
Ans. On Saturday he was at Wheeling, either at Wheeling or Cameron; he was with me on the way train.
Ques. Do you know whether he was from Wheeling as brakeman?
Ans. I couldn't tell; Saturday was the first day he was with me.
Ques. Tell the jury how this ground switch, this second one, operated, and whether they were easy to be operated?
Ans. They are about as easy as any the rest of them.

By the COURT:

Ques. Did you operate them much when you was brakeman?
Ans. Yes, sir.
Ques. How long were you brakeman?
Ans. 7 or 8 months.

By Mr. HUTCHINSON:

Ques. You know where this switch was located that night, this upper switch?

Ans. Yes, sir.

155 Ques. The second one, the east switch, where he is said to have been hurt?

Ans. Yes, sir.
Ques. Do you know the distance between the tracks where this switch is located?
Ans. 5 or 6 feet.
Ques. Was there ample space to operate it without the brakeman getting on the track?
Ans. Yes, sir; if he would stand between the tracks; I have done it. Stand in the centre and throw the lever up and put my foot on it and throw it down; if I would push it down with my hands I would mash my fingers.

By the COURT:

Ques. Did you ever work that switch while running as brakeman?
Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. Was there any necessity for you to get between that switch and either track as you was opening or closing it?
Ans. No, I don't know that there was.
Ques. Any neces'ity, I mean?
Ans. I don't know that there is; you can stand in the middle of the track, and lock; between the tracks I mean; that is the way I always unlocked it.

By the COURT:

Ques. Which was the usual and ordinary way?

Ans. Stand right in front of it.

156 Ques. Which is the usual and ordinary way of unlocking all switches?

Ans. Standing right in front of the lever.

Ques. If you stood right in front of it you would not, of course, necessarily stand on either side?

Ans. No, sir.

Ques. Be between the two sides?

Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. Standing that way between the two tracks to operate the switch, was there any danger of being injured by a locomotive?

Ans. No, sir.

Ques. Was there any danger of any passing locomotive or train the way you did it?

Ans. No, sir.

Ques. You entered this first or west ground switch; what became of you after enter'g that?

Ans. We pulled up to the east end of that switch and cut two or three cars loose and told the brakeman to let them out and back them on to the bank track—another switch, 30 or 40 feet.

Ques. And then backed those on to another track; that was the direction you gave him?

Ans. Yes, sir.

Ques. Were you at this point where it is said he was hurt?

Ans. After the accident?

Ques. Were you there before?

157 Ans. No, sir.

Ques. See him at work at this switch?

Ans. No, sir.

Ques. Describe what you saw of the accident?

Ans. I told him to unlock this first switch and leave the key in the ball and I would get it, and get the key of the other switch from the engineer. As I was going up to the office I met a darkey. He said your brakeman is hurt or killed. I hurried up and saw the brakeman sitting between the two tracks holding his foot; the train had pulled through the switch and was standing waiting for him to open the switch to back off onto the other track.

Ques. How far had this train pulled away from this switch?

Ans. About 30 feet—30 or 40 feet, up to the next switch.

Ques. Look at that map. Tell the jury where those points are, the switch at which the accident took place, and the switch where the train stood?

Ans. Here's where the accident occurred, and here's where we was going to back off. He was sitting in between these two tracks.

Ques. You were going to the office when you heard of the accident; you didn't see it occur?

Ans. No, sir.

158 Ques. Didn't know how it occur'ed?

Ans. No, sir.

Ques. Didn't know what had interfered with him?

Ans. No, sir.

Cross-examination by Mr. DOVENER:

Ques. He was your brakeman that even'g?

Ans. Yes, sir; from Farmington.

Ques. When you found him at Farmington did you have a brakeman?

Ans. No, sir.

Ques. You was going to Grafton without a brakeman?

Ans. Yes, sir.

Ques. Did you need a brakeman?

Ans. I don't know, on that part of the road. I told him to go along with me and I would report him and get him a quarter or half a day's time?

Ques. Did you report him?

Ans. Yes, sir.

Ques. Do you know whether they allowed it or not?

Ans. I do not.

Ques. When you got up there you told him where the switch was to be found?

159 Ans. I told him to back; I supposed he knew where the upper switch was, he had been braking on the road; I supposed he knowed the switch.

Ques. He was down on the other end of the road—Cameron—wasn't he, before Saturday?

Ans. I don't know how long he was on the road; the only day he was with me was on *on* Saturday; he was a stranger to me.

Ques. I will ask you the plain question, consider'g the place it is in. You, as a railroad man, with a view to safety, would you put in that kind of a switch at that point; would you consider that a safe switch, consider'g the place it was in and the number of trains passing there?

Ans. A man could make it dangerous if he wanted to.

Ques. Do you consider that a dangerous switch or a safe switch?

Ans. If used properly I should say it was a safe switch.

By the COURT:

Ques. The question is this: Is that switch safe for a man in the employment of your company to operate it, he exercising ordinary care in the opening of it?

Ans. Yes, sir; I should think so.

By Mr. DOVENER:

Ques. You are in the employ of this company, ain't you?

Ans. Yes, sir.

Ques. Conductor?

160 Ans. Conductor.

Ques. How long have you been in the employ?

Ans. Going on 9 years; 8 or 9 years.

Ques. You say a man who uses ordinary care needn't be hurt, then?

Ans. Yes, sir; I did.

Ques. Why was it you was so intensely outraged on that evening and was hunting for that engineer to shoot him.

Ans. I wasn't.

Ques. Didn't you hunt for him?
Ans. No, sir.
Ques. Didn't you feel somewhat incensed at that engineer that evening?
Ans. I might *of*.
Ques. Didn't you go to hunt for him?
Ans. I don't know that I did.
Ques. Do you know that you didn't?
Ans. I don't recollect that I went to hunt for him.

By the COURT:

Ques. Recollect of saying anything about ti?
Ans. I don't know as I do.
Ques. Did you ever tell about it?
Ans. No, sir.
Ques. (By the COURT.) Who was the engineer?
Ans. (By Mr. DOVENER.) Taylor Groves.
Ques. Did you see Taylor Groves that evening?
Ans. No, sir; I didn't know him at that time.
161 Ques. Didn't you enquire who it was?
Ans. I believe so.
Ques. What was your object in enquiring who it was?
(Objected to by Mr. Hutchinson; objection overruled; exception.)
Ques. Why did you enquire for the engineer that evening?
Ans. I don't know as I did enquire.
Ques. Do you recollect what you did after you found Mr. Randall in that position?
Ans. Yes; I went to hunt some person to carry him out of there.
Ques. Who went with you?
Ans. Nobody as I know off.
Ques. After you had secured some one to carry him out, you carried him out?
Ans. Yes, sir.
Ques. What did you do after that?
Ans. Backed train off.
Ques. After that what?
Ans. Put my report in the office and went to where he was.
Ques. And after that?
Ans. Went home, I suppose.
Ques. Is it a fact that you went home?
Ans. No place else to go to.
Ques. Never made any enquiry for Groves, or who was conductor, or made no threats of him?
Ans. No, sir.
162 Ques. (By the COURT.) Who did he enquire of.
Ques. (By Mr. DOVENER) Didn't you go to the office of the company and enquire who was the conductor of that train, and who was the engineer?
Ans. No, sir; I don't know that I did.
Ques. Didn't you, on the 22d of this month, say to this young man (indicating Charles Martin) you did that thing?
Ans. No, sir, I didn't; I haven't saw that man for two years.
Ques. Recollect where this man boards?

Ans. Yes, sir.

Ques. You was down there day before yesterday?

Ans. Yes, sir.

Ques. At that boarding-house, day before yesterday, didn't you and he discuss it; and he asked you about your going to the office to enquire about the engineer of that engine?

Ans. I told him I didn't.

Ques. That's plain enough; you recollect the conversation?

Ans. Yes, sir.

Ques. Did you see any engine and car pass you on your way up?

Ans. No, sir; I didn't see it until it was going in the "Y."

Ques. Having backed down, passed the Grafton House, it was then going into the "Y?"

163 Ans. Yes, sir.

Ques. Do you know of any one being killed at that switch?

Ans. No, sir; I don't know at that switch.

Ques. Did you know Henry Hankner?

Ans. I did not.

Ques. Did you ever hear of his being killed there?

(Objected to.)

Ans. I didn't know him at all.

Ques. I mean by an engine—by an engine at that switch?

Ans. I told you I didn't know of anybody being killed right at that switch.

Ques. Did you know Jack Messenger?

Ans. No, sir.

Ques. Did you know of his being killed there at that very switch?

Ans. No, sir; I did not.

Ques. Of engine 302 backing over him, with a tender attached to it?

(Objected to. Overruled.)

Ques. Haven't you talked with Oaky Randall about this case?

Ans. Yes, sir.

Ques. In those conversations, I want to ask you if you haven't expressed yourself to him that this was a dangerous switch and a slaughter-yard?

Ans. No, sir; I never did.

164 Ques. Do you recollect of one occasion, at Grafton there, of telling Mr. Randall to bring suit against the company?

Ans. No, sir; I never did.

Ques. On the platform at Farmington, didn't you have a conversation with Mr. Randall after he had recovered, in which you told him to bring suit?

Ans. Never told him to bring suit.

Ques. Didn't you tell Charles Martin that was a slaughter-yard?

Ans. No, sir.

Ques. Do you recollect day before yesterday of consulting me on business in my room?

Ans. Yes, sir.

Ques. Do you recollect of telling me that was a dangerous switch?

Ans. No, sir; I don't know that I did.

Ques. Do you recollect you didn't tell me that?

Ans. You was showing me that map.

Ques. What remark did you make about the character of that switch? In the place in which it was, did you say it was safe or dangerous?

Ans. I don't know as I said it was either.

Ques. Did you express any opinion while there about it?

Ans. All I said, there was a man killed this side of the switch; engine backed over him.

165 Ques. Didn't you mention the fact it was a slaughter-yard there, and mention the fact that not 3 months ago there was a man killed—a man named Shey?

Ans. No, sir; I did not.

Ques. How long ago was that?

Ans. It has been a year or two ago since he was killed.

Ques. Do you recollect of my making that memorandum on paper?

Ans. Not at three months. I didn't see you make no memorandum.

Ques. Do you recollect yesterday being here and leaving this court-room?

Ans. Yes, sir.

Ques In whose company did you?

Ans. Joe Bessett and John Kaufman

Ques. And Mr. Randall?

Ans. I don't recollect.

Ques. Recollect of having any conversation on the way down there in which drinks were mentioned?

Ans. Yes, sir; I do.

Ques. Do you recollect of making a remark to Mr. Randall, "Come and treat and we will swear to anything you want us to." Didn't you make that remark?

Ans. I did, to Joe Bessett, and Bessett went to him.

166 Ques. That if he would that you was to swear to anything in this case?

Ans. There was something said about that, but I ain't that kind of a man. We was joking.

Ques. Didn't you make that remark?

Ans. I did say if he treated I might swear to a lie. Okey said all he wanted us to do was to swear to the truth; but I ain't that kind of a man. We was joking.

Ques. Have you been joking since you have been on the stand?

Ans. No sir; I have been telling the truth.

Redirect examination by Mr. HUTCHINSON:

Ques. After that joking with Bessett and Randall, did they treat?

Ans. No, sir.

Ques. Was it after that Dovener got you up in his room and asked you about this?

Ans. No, sir; I haven't been up since Monday.

Ques. You say you didn't have the conversation he p'etends you had?

Ans. No, sir; not all of it.

By Mr. DOVENER:

Ques. The business you went up into my room for was a very different character from this, wasn't it?

Ans. Yes, sir; it had nothing to do with this case at all.

167 BENJAMIN BERRY, called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Where do you reside, Mr. Berry?

Ans. Grafton.

Ques. How long have you resided there?

Ans. 16 years.

Ques. What has been your business or employment?

Ans. Supervisor of track.

Ques On what portion of the railroad?

Ans. On the main stem from Grafton east—Grafton to Tunnelton.

Ques. Including the yard embracing this particular switch alluded to?

Ans. Yes, sir.

Ques. You were in Grafton prior to the 22d of March, 1874?

Ans. Yes, sir.

Ques. What knowledge have you of the construction and use of the ground switch, such as have been spoken of?

Ans. We consider them as a safe, compact, good switch.

By the COURT. Describe the switch, Mr. Witness.

Ans. (Witness here described switch by reference to different positions in the court-room.) In the centre between the two planks there is a crank,

168 and on the end of that crank there is a lever, forming a half circle, which *which* shifts the bar.

By Mr. HUTCHINSON:

Ques. Is that character of switch such an one as is in general use by the B. & O. R. R. Co. as yard switches?

Ans. They are.

Ques. What is the size of the fulcrum?

Ans. The pin on which the lever works is an inch and a quarter, and from that point to the end of the crank, from the fulcrum to where the bar takes hold, is 2½ inches.

Ques. Is that kind of switch easily or hardly operated?

Ans. Easily operated, from the simple fact that the leverage is short.

Ques. I want you to tell us whether that character of switch placed where this was between these two tracks, which has been described by two or three witnesses, can be operated easily, without difficulty?

Ans. It can be operated easily; no difficulty about it.

Ques. Tell the jury whether there is any necessity in the operating of switches such as that for the brakemen to get on the track, one side or the other?

Ans. Not absolutely necessary. Not necessary.

Ques. Tell the jury whether it can be operated by approaching it in front, as described by one or two witnesses here?

Ans. Yes, sir.

169 By the COURT:

Ques. Tell the jury what is the ordinary mode of opening that switch to operate it?

Ans. Well, the ordinary mode is to simply walk up to the switch, unlock it, and shift the lever, walk right out in the middle between the two

tracks. The lock is about six inches from the end. A man can certainly reach to that point without getting on either track.

Ques. What is the safest mode to opperate that switch with a view to opening and changing it?

Ans. The safest way to go would be to keep in between the two tracks; just go to unlock it; just got to stoop down—not necessary to kneel down—unlock, and shift the switch over.

Ques. In opening it in that way is it necessary for him to throw any part of his person over the tracks?

Ans. Not necessary.

Ques. How many times have you seen it opened and closed?

Ans. I couldn't say; I have seen it operated for the last 16 years; never kept account.

Ques. State how long before this accident you had taken notice of this switch?

Ans. For the last 16 years it was my duty to keep it in repair.

Ques. Tell the jury whether it was in good repair on the night of the 22d of March, 1874?

170 Ans. Good repair, to the best of my knowledge.

Ques. Had you, as the officer in charge of that yard, any knowledge of its being in repair?

Ans. I had not.

By the COURT:

Ques. How do you ascertain knowledge as to things being out of repair?

Ans. By observation.

Ques. Tell us what you do.

Ans. By simply seeing whether they are worn.

Ques. State whether it is part of your duty to make examination, and whether you do these things.

Ans. Yes, sir; it is my duty to do it every time I pass there.

Ques. Was it any part of your duty to examine this switch as well as the tracks?

Ans, No, sir; there is a man in the yard passes over the switches every day and he reports to the foreman.

Ques. Suppose it wanted mechanical work?

Ans. The foreman will have it done.

Ques. Tell the jury whether the company had, in March, 1874, a proper man employed at its shops in the yard to look after these switches, and, if out of repair, repair them.

Ans. Yes, sir; they had.

By Mr. HUTCHINSON:

Ques. Tell the jury, Mr. Berry, what kind of switch is at the opposite end of this side track, west of the Grafton Hotel?

171 Ans. Spring ball ground switch, same as the one at the east end.

Ques. Same there that night, the 22' of March?

Ans. Yes, sir.

Ques. Could the train on which the plaintiff was acting as brakeman get upon this track from which the train was let off on to the track of this switch we are speaking of without entering this western ground switch?

Ans. Not from the west end, it couldn't.

Ques. I wish you to tell the jury what the distance is, if you can, from the upper end of the platform of the Grafton Hotel to this ground switch, or, in other words, from this bridge, what is called the public bridge, that goes over the upper end of the platform?

Ans. Without accurate measurement it is in the neighborhood of 300 feet; of course I couldn't give you the exact length; it is in and about 300 feet.

Ques. Tell the jury whether, since you have been there, or whether on the 22' of March, there was any public crossing where this switch is located?

Ans. No public crossing there.

Ques. In use by the public then—a public crossing?

Ans. No, sir.

Ques. Something has been said about a board walk in front of some houses on the north side of the track; tell the jury if you know of
172 any board walk reaching up from the alley-way there, described by Mr. Zeek, I believe.

Ans. There is a board walk from the end of the bridge; down to the west end of the Valley House, I think, is as far as the walk extends, and there is no walk down to the company's houses.

Ques. How far then, judging from where this bridge is located—how far out east would that board walk extend from the north end of this bridge?

Ans. It would extend 200 feet, may be not so far; extends to the west end of the Valley House.

Ques. Is there any public way by which the people of Grafton come down from the town, by steps and otherwise, and cross the track in and about where this accident happened?

Ans. There is steps, but no alley opposite those steps; there is an alley properably 100 feet more or less west—an open way.

Ques. What kind of steps; do you know who constructed them, who constructs them?

Ans. Private steps, owned by parties owning property on the bank.

Ques. Who claims them?

Ans. Parties that own the property opposite those steps.

Ques. Are those steps any part of the easement of these streets?
173 (Objected to.)

Ques. I want to know whether these steps are owned and controlled by the town of Grafton?

Ans. No, sir.

Ques. Something has been said about this wire bridge; describe to the jury where that is located. That is on the south side of the tracks across Three Forks?

Ans. It crosses Three Forks opposite the east end of the Grafton House.

Ques. Do you know who constructed this bridge?

Ans. I do not; the first bridge was built, I think, by the people of Grafton; that blew down; I don't know who built the other one.

Ques. The people who would pass that bridge from South Grafton in order to pass to North Grafton—tell the jury what was the usual course of crossing the company's tracks or property to get there?

Ans. They would cross over the track that leads into the engine-house, and then over a track to the platform, and then over—cross over this bridge.

Ques. Is that the common way of crossing there?

Ans. From that end of town.

Ques. Tell the jury what kind of a bridge that is?

Ans. Simply a foot-bridge for passengers to walk over.

Ques. (By the court.) Where is this bridge at? Do you call that a creek there?

174 Ans. It is called Three Forks.

Ques. How far is the bridge above the mouth of that?

Ans. 100 feet, more or less.

Ques. Is there more than one crossing or bridge there across that creek?

Ans. Yes, sir.

Ques. Where is the next one?

Ans. Further up; wagon-bridge probably 1,000 feet above.

Ques. That is a wagon-bridge?

Ans. Yes, sir.

Ques. Where is there a street or anything on the opposite side; where do they cross to get to North Grafton?

Ans. Bridge and crossing.

Ques. Where at?

Ans. At east end of Grafton yard.

Ques. How far is that beyond where this accident took place?

Ans. Between 900 and 1,000 feet.

Ques. How far is the foot-bridge west of where the accident took place?

Ans. Parties crossing the foot-bridge would use the foot-bridge probably 1,000 feet west of that.

Ques. Parties using the foot-bridge, if they went across the point where the accident is said to have occurred, would that be in their way?

175 Ans. It would depend on where they was going.

Ques. Going to the streets of the town?

Ans. Well, it wouldn't be entirely out of the way; it would be more convenient to cross the bridge.

Ques. Then I understand you to say this switch at which it is said this man was injured is located about 1,000 feet west of what is known as the upper crossing, which is a bridge crossing this Three Forks Creek?

Ans. Yes, sir; the bridge that crosses the creek 1,000 feet further up from the wire bridge.

Ques. I want to understand how far above where this accident is said to have taken place is this upper crossing.

Ans. Of course I don't know accurately; I judge it is between 800 and 900 feet—may be 1,000.

Ques. Tell the jury whether there is a public crossing for wagons and otherwise west of where this accident took place for the people of Grafton.

Ans. That is about 900 feet, to the best of my knowledge.

Ques. Describe that to the jury.

Ans. 900 feet west of where this accident should have occurred a crossing—no bridge. It is only used when the water can be forded.

Ques. For what purpose is that used?
Ans. For all purposes.

Cross-examination by Mr. DOVENER:

176 Ques. I understand that this west crossing is within about 900 feet of where this accident happened?
Ans. Yes, sir.
Ques. And the other one is from 800 to 900 feet above?
Ans. 1,000; for all I know.
Ques. And there are public crossings for wagons, teams, and all that want to cross?
Ans. Yes, sir.
Ques. And within the town of Grafton?
Ans. Yes, sir.
Ques. How many feet, on a direct line north and south, is the wire foot-bridge, drawing a line north and south, above or below the point where this accident occurred?
Ans. I think it is west, probably 100 feet; I don't know.
Ques. These steps you speak of—how do you know they are controlled by private parties?

Ans. I know it from observation.
Ques. What is your business?
Ans. Supervisor of track.
Ques. Do you stay in Grafton all the time, or up and down the road?
Ans. Up and down the road from Tunnellton to Grafton.
Ques. You are over that every day?
Ans. Some part of it every day.
177 Ques. Do you know anything, of your own knowledge, that the town of Grafton lays any claim to those; have you any knowledge on the question as to whether the town of Grafton lays any claim to those?
Ans. I don't know that they do; I have no knowledge of the fact.
Ques. How long did you say that big bridge has been built over the railroad?
Ans. I think in '69 or '70 it was built.
Ques. How did the people get across that railroad track before that?
Ans. Walked across.
Ques. It was a public crossing, then, before that?
Ans. No, sir; they came across wherever they chosed or pleased.
Ques. Who put that up, do you know, that bridge across the railroad?
Ans. Railroad company.
Ques. Do you know whether the town of Grafton authorized them to do it, or did they do it of their own motion?
Ans. Of their own motion.

ARTHUR SINSEE, called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Mr. Sinsee, what business are you engaged in?
Ans. Assistant master of road.
178 Ques. For what company?

Ans. They would cross over the track that leads into the engine-house, and then over a track to the platform, and then over—cross over this bridge.

Ques. Is that the common way of crossing there?

Ans. From that end of town.

Ques. Tell the jury what kind of a bridge that is?

Ans. Simply a foot-bridge for passengers to walk over.

Ques. (By the court.) Where is this bridge at? Do you call that a creek there?

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Ques. How far is the bridge above the mouth of that?

Ans. 100 feet, more or less.

Ques. Is there more than one crossing or bridge there across that creek?

Ans. Yes, sir.

Ques. Where is the next one?

Ans. Further up; wagon-bridge probably 1,000 feet above.

Ques. That is a wagon-bridge?

Ans. Yes, sir.

Ques. Where is there a street or anything on the opposite side; where do they cross to get to North Grafton?

Ans. Bridge and crossing.

Ques. Where at?

Ans. At east end of Grafton yard.

Ques. How far is that beyond where this accident took place?

Ans. Between 900 and 1,000 feet.

Ques. How far is the foot-bridge west of where the accident took place?

Ans. Parties crossing the foot-bridge would use the foot-bridge probably 1,000 feet west of that.

Ques. Parties using the foot-bridge, if they went across the point where the accident is said to have occurred, would that be in their way?

175 Ans. It would depend on where they was going.

Ques. Going to the streets of the town?

Ans. Well, it wouldn't be entirely out of the way; it would be more convenient to cross the bridge.

Ques. Then I understand you to say this switch at which it is said this man was injured is located about 1,000 feet west of what is known as the upper crossing, which is a bridge crossing this Three Forks Creek?

Ans. Yes, sir; the bridge that crosses the creek 1,000 feet further up from the wire bridge.

Ques. I want to understand how far above where this accident is said to have taken place is this upper crossing.

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Ques. Tell the jury whether there is a public crossing for wagons and otherwise west of where this accident took place for the people of Grafton.

Ans. That is about 900 feet, to the best of my knowledge.

Ques. Describe that to the jury.

Ans. 900 feet west of where this accident should have occurred a crossing—no bridge. It is only used when the water can be forded.

Ques. For what purpose is that used?
Ans. For all purposes.

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Ans. Yes, sir.
Ques. And the other one is from 800 to 900 feet above?
Ans. 1,000, for all I know.
Ques. And there are public crossings for wagons, teams, and all that want to cross?
Ans. Yes, sir.
Ques. And within the town of Grafton?
Ans. Yes, sir.
Ques. How many feet, on a direct line north and south, is the wire foot-bridge, drawing a line north and south, above or below the point where this accident occurred?
Ans. I think it is west, probably 100 feet; I don't know.
Ques. These steps you speak of—how do you know they are controlled by private parties?

Ans. I know it from observation.
Ques. What is your business?
Ans. Supervisor of track.
Ques. Do you stay in Grafton all the time, or up and down the road?
Ans. Up and down the road from Tunnellton to Grafton.
Ques. You are over that every day?
Ans. Some part of it every day.
177 Ques. Do you know anything, of your own knowledge, that the town of Grafton lays any claim to those; have you any knowledge on the question as to whether the town of Grafton lays any claim to those?
Ans. I don't know that they do; I have no knowledge of the fact.
Ques. How long did you say that big bridge has been built over the railroad?
Ans. I think in '69 or '70 it was built.
Ques. How did the people get across that railroad track before that?
Ans. Walked across.
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Ans. Railroad company.
Ques. Do you know whether the town of Grafton authorized them to do it, or did they do it of their own motion?
Ans. Of their own motion.

ARTHUR SINSEE, called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Mr. Sinsee, what business are you engaged in?
Ans. Assistant master of road.
178 Ques. For what company?

Ans. Baltimore and Ohio Company.

Ques. How long have you been such?

Ans. Since the 18th of October last.

Ques. What was your employment prior to March, 1874, or in March, 1874?

Ans. I was in the water-station department.

Ques. Were you acquainted with the operation of the road in 1874?

Ans. I was.

Ques. With the use of switches, such as the company used at Grafton?

Ans. Yes, sir.

Ques. Are you familiar with the locality about Grafton—the way the tracks are laid and the distances between—say, for instance, between where this public bridge is from the east end of Grafton Hotel platform?

Ans. Yes, sir.

Ques. Look at this map, and tell the jury what you know about that?

Ans. This map as detailed is correct, having made it myself, and measured with a tape line the distances on the map.

Ques. What is the distance from the bridge to the switch in controversy?

Ans. 300 feet.

Ques. What is the width between the tracks where this switch is located?

179 Ans. 5 feet 10 inches.

By Mr. DOVENER:

Ques. At what time?

Ans. It was 5 feet 10 inches. I measured it between them yesterday morning.

By Mr. HUTCHINSON:

Ques. Has it been altered?

Ans. It has not, to my knowledge.

By the COURT:

Ques. Is it the same it was at the time the accident took place?

Ans. Yes, sir.

By Mr. HUTCHINSON:

Ques. What kind of switch is at the west end of the hotel?

Ans. A ground lever.

Ques. Do you know these switches are operated?

Ans. They are operated by what is termed a ground lever, from 24 to 26 inches in length; that lever being fastened upon a rod which forms a crank, 2½ inches, makes the leverage 2½ inches, and in operating it travels a half circle, throwing the transfer-bar 5 inches.

Ques. What mode of operating that was the safest and best by the men employed, or have you operated them?

Ans. I never have used the switch as an employee of the transportation department. In the construction I have operated them.

Ques. How are they operated?

Ans. To operate the person should have the switch in front of him, and unlock it and throw the lever over.

180 Ques. You saw where this switch was located, and the distance

from track to track. Tell the jury, from your knowledge of the construction of that switch, if it was necessary for the operator of it to get upon either side of the track or not in the operation.

Ans. In my judgment it is not, was not, necessary.

Ques. If that switch was situated, on the night of the 22d of March, 1874, as you have described it now, was it necessary for the plaintiff, Randall, to get more to one side than the other to operate that switch?

Ans. I think not; the fulcrum or crank only being 2½ inches, the bars spring 5 inches, makes the switch pretty much easier than one of the high ball-switches; from the high ball-switch is about 11 inches from the pin to where the connecting-rod takes hold of the lever, whereas this one is 2½ inches, and turns over the same distance.

Ques. State to the jury whether the company have in use or had in use these ground switches at other places of the same character.

Ans. They have in use and have had since I have known the road. I was near 20 years in the service, in the yard at Piedmont, at where coming into the yard at Parkersburg, as well as the Grafton yard.

181 Ques. Have the company used these perpendicular lever switches in this yard?

Ans. No, sir; the high ball couldn't be used by placing the ball between the tracks in such locations in the yard.

Ques. Explain that to the jury?

Ans. It would be in the way of cars and dangerous for persons on the train, if it didn't strike the train, the lever being so long from the point of connection on the bar that the ball would have to pass over so far. It would be in the way and dangerous on other tracks.

Ques. Do you know of any switch in the use of the company that is as safe for the operator as this switch—as a ground switch—in the place located?

(Objected to, and objection sustained.)

Ques. Tell the jury, from your knowledge of this switch, its location, and purpose used for, whether it was suitable and adequate?

Ans. I so regard it; think it the safest switch we could put in that location.

Ques. Tell the jury whether the defendant company at Grafton had men employed to examine the tracks and switches and to keep it in good repair and condition?

Ans. They have.

Ques. Sufficient number of men to do it?

182 Ans. They have.

Ques. At and before the time of this accident?

Ans. They had.

Cross-examination by Mr. DOVENER:

Ques. You just now mentioned that you regarded this as the safest switch that could be placed there. Now, could not a safer switch be placed to one side that would perform all the functions of this switch?

Ans. I think not.

Ques. You are master mechanic?

Ans. No, sir; assistant road master.

Ques. And you think a switch couldn't be placed to one side 10 feet away that would perform the same work that does?

Ans. No, sir; it makes your connecting rod so long that it is liable to spring, that it becomes dangerous; the bar connecting from the lever to the transfer rails is so long that it is not regarded safe, and being *and being* on the main track it constantly endangers the lives of passengers.

Ques. Haven't you such switches on the B. & O. road?

Ans. Not to my knowledge.

Ques. Passing clear under one track?

Ans. Not in main tracks, to my knowledge; there is what we
183 term a lateral switch which regarded as safe.

Ques. How would a spring ball-switch on the other side of the tracks, not between the tracks, do?

Ans. That wouldn't be practicable, from the fact there is a net-work of tracks across there.

Ques. Would it be possible to place a switch-ball that would work in a lateral position, and not across, that would throw a bar right across?

Ans. I have never seen anything of that kind; it might be possible.

Ques. Suppose this was a switch; by an elbow couldn't you work the switch that way?

Ans. There possibly might be a contrivance of that sort constructed, if we had power to operate it.

Ques. Wouldn't it take less power to throw it over; couldn't a lever be set to work right up, straight up and down the track, and be more safe than the one across?

Ans. There might be something of that sort; I have never seen anything in the switch line like it.

Ques. You have been on railroads where they didn't use those ground switches?

Ans. I have been on other roads, but never gave attention to it; my notion is that other roads use them; I can't personally say.

Ques. Didn't you hear one of your witnesses say he worked on a road that didn't use them?

Ans. Yes; and I heard Mr. Boygess say to-day he examined in a yard in Philadelphia, and they did use them.

184 Ques. I understood you to say one objection to using a high ball-switch—the reason it worked hard—the lever below the fulcrum was 11 inches below?

Ans. They vary some.

Ques. You could make one shorter?

Ans. You could, but that would come nearer a ground switch?

Ques. Suppose, instead of being at the end, this ball that connects, you set it back a foot or two; wouldn't the further you set it back increase the distance you throw it?

Ans. It is necessary to have the rails clamped for security. Of course it goes the furtherest. In order to make it secure it wouldn't be considered safe to put the ball back from the rail that secures the rail and holds it in place.

Ques. Isn't it possible to secure that rail in some other way?

Ans. There may be something which has not been brought to my knowledge.

Ques. Do you call this an invention to place this iron bar between two rails?

Ans. That is an invention; yes, sir. It is necessary to have in your switch station something to secure the rail so as to hold it firm.

Ques. And the shorter you would make the lower part of this high ball-switch the more secure it would be?

185 Ans. Certainly; but then the rail has got to travel so far. In the ground lever it is necessary for it to travel a half circle. In the high ball, say a quarter circle.

Ques. If you place your bar further back and shorten the fulcrum, wouldn't it be secure?

Ans. You must have something there to secure it.

Ques. The difference in the length of the lever is the difference in the security. The long arm of the lever can't have anything to do with that part?

Ans. No difference in the connection, but in the operating, in the force necessary to spring the bars. I suppose $\frac{9}{10}$ of the accidents on the B. & O. R. R. at switches, before strengthening those bars, were caused by the bars springing.

Ques. On the straight track?

Ans. Yes, sir.

Ques. Couldn't you strengthen one of those bars as well as the other?

Ans. Of course you strengthen, but you couldn't get to the rail without going through.

Recess until 7.15 p. m.

EVENING SESSION.

JOHN ADAIR, called for defendant, sworn, testified as follows:

186 Direct examination by Mr. HUTCHINSON:

Ques. Where did you reside in March, 1874?

Ans. At Grafton, sir.

Ques. What was your business?

Ans. I was agent there, sir.

Ques. Agent for the company defendant.

Ans. Yes, sir.

Ques. Were you acquainted with the location of the tracks and switches in the yard at Grafton?

Ans. Yes, sir; I was at that time.

Ques. Do you remember the night of the accident to the plaintiff?

Ans. Yes, sir.

Ques. Were you there then?

Ans. I wasn't at the place of the accident at that time. I was in Grafton. I expect I was at home.

Ques. You know, then, the location of this switch where it is said he received his injury?

Ans. Yes, sir; I have seen the switch frequently.

Ques. Will you tell the jury what kind of switch was placed at the western end of this track to connect it with the main track coming from Wheeling to Grafton?

Ans. Well, it's a lever switch; it is connected by timbers with the switch so it lies down along with the main track.

Ques. Known as a ground switch?

187 Ans. Yes, sir.

Ques. Tell the jury whether or not it was similar to the one at the eastern end of the track.

Ans. I think they were both the same; constructed the same, at least.

Ques. Can you tell the jury whether or not, from your knowledge of the switch at the eastern end of the track, it was suitable for the purpose which it was intended?

Ans. Yes, sir; my opinion it was.

Ques. Had you seen it operated by men in the service of the company?

Ans. I couldn't just name the man, but it was used by the men there daily and yearly.

Ques. Had you seen it operated by men in the service of the company before this accident?

Ans. Yes, sir.

Ques. Were you familiar with the *principal* upon which it was constructed?

Ans. No; not altogether.

Ques. Had the company, at that time, men in its employment, those who had charge or supervision of tracks and switches in that yard?

Ans. Yes, sir.

Ques. Were they competent men?

Ans. Yes, sir.

188 Ques. Do you know the location of the bridge connecting the platform of the hotel there with North Grafton, I believe it is called—the structure at the east end of the platform at *at* the hotel there?

Ans. Yes, sir.

Ques. You know that?

Ans. Yes, sir.

Ques. Please tell the jury as near as you can how far above that bridge was this switch located?

Ans. I can't just say exactly how far; I should say 250 or 300 feet; likely may not be that far.

Ques. Will you tell the jury, from your recollection of the facts then existing, in March, 1874, whether there was a public crossing about the place of this switch in question?

Ans. No public crossing that I know of.

Ques. How long had you been at Grafton before this accident?

Ans. Well, I went there in 1867, as their agent at Grafton; I was there frequently, though, before that, a great many years.

Ques. Was there or not near this point any public crossing, where this accident is said to have taken place?

Ans. No, sir; not as I know of, excepting this bridge; that is in the east end of the platform.

189 Ques. State to the jury whether there was any other crossing for the people going to North Grafton or coming from North Grafton to the hotel, in that direction, other than that bridge, in that vicinity?

Ans. That is the only one I know of.

Ques. Do you know anything in regard to some steps said to have been made above this bridge, that went up from the tracks, or near the tracks, then into North Grafton?

Ans. There is; several steps was there; they have been removed at different times; as the company has widened out their bank the steps would be removed opposite the different houses on the bank of the railroad.

Ques. State whether or not those were public entrances or steps as a part of the highways of the town?

Ans. They were private steps.

Ques. Do you remember; if so, state, Mr. Adair, how many different tracks there were between the Grafton House platform and the bank or bluff there on the north side?

Ans. I think there was 4, if not 5; 4 tracks.

Ques. How was it as to the number of tracks at the point where this accident is said to have taken place and the north side of the yard of the company there?

Ans. I think there was two tracks branched off from that point above there.

190 Ques. On the south side of the yard there, was there any dwellings, stores, or any part of the town of Grafton used by the public located on the south side between Three Forks and the north side of company's yard?

Ans. No, sir; there were none.

Ques. What was located along on the banks of that creek?

Ans. Roundhouse, machine-shop, carpenter shop, blacksmith-shop.

Ques. Tell the jury who was in possession of and controlled the space existing between the north side of the yard there and the bank of this creek, from the Grafton House on up the eastern limits of the town?

Ans. B. and O. R. R., sir.

Cross-examination by Mr. DOVENER:

Ques. When was the first time you ever was in Grafton?

Ans. When the track was first laid along there.

Ques. Where was that laid?

Ans. Where it is now.

Ques. Don't you recollect it ran down the bank of the creek, down lower?

Ans. No, sir.

Ques. At that time was there any street ran along those houses, called Railroad street?

191 Ans. I think not, sir; there was no town at that time; didn't know it by the name of Grafton at all when we went through there.

Ques. When it was incorporated in 1856, wasn't that street called Railroad street, along-side the track there?

Ans. I don't know, sir.

Ques. Which you speak of having been cut down and subsequent tracks laid along, going north?

Ans. I think the company owns the land so far as I have seen from stakes there up to the buildings.

Ques. These buildings are below, are they not?

Ans. This is individual buildings where you say the bank was cut.

Ques. When that track was first laid that was high ground, wasn't it?

Ans. Portion of it was, and a portion was a marsh.

Ques. And as the company needed room for another track they cut that ground down?

Ans. Yes, sir.

Ques. Before this bridge was put up by the company across the railroad tracks, what streets did the citizens come down? I am speaking now, just before this bridge was made over these tracks by the Baltimore Company?

Ans. If they wanted to come over to South Grafton they must necessarily cross over the tracks. I don't know of any street there except where this bridge connects.

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Ques. They came down then and walked over the tracks?

Ans. Yes, sir.

Ques. Are there any streets in Grafton?

A. Yes, sir.

Ques. Where are they?

Ans. Not on the railroad.

Ques. They aint allowed to run in on the railroad?

Ans. The creek interferes.

Ques. The creek wouldn't interfere with a street approaching the railroad on the north, would it?

Ans. No, sir.

Ques. Coming from Main street down to South Grafton?

Ans. That is the only outlet there is at that particular point.

Ques. Do you know of a street approaches the railroad track im'ediately above there in which stone steps come down?

Ans. That is up at the freight depot.

Ques. What is the name of that street?

Ans. I don't know; there is a street there.

By the COURT:

Ques. How far above is this where this accident occurred?

Ans. I suppose about 4 or 5 hundred feet.

By Mr. DOVENER:

Ques. Whose store does that run down there by; there's stores

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right on the upper side of Main street, isn't there?

Ans. I think on Main street there is a Mr. Hanshaw keeps there.

Ques. There is a public street runs right down to your track?

Ans. Yes, sir; freight depot.

Ques. And you built a little stone wall along there, and there is steps made in the wall to go down on to your track?

Ans. Some steps; yes, sir.

Ques. Who built that wall?

Ans. I expect the company built that wall.

Ques. Didn't they build it because it was a street, and they couldn't shut it up?

Ans. I don't know.

Ques. Why did they make those steps there?

Ans. I can t say what they made them there for, except for their employees and pa'ties engaged at that warehouse.

Ques. What was the employees doing going up-town?

Ans. They have a freight man at the freight building; he necessarily comes down to examine the cars at the siding.

Ques. Did they build those steps for the freight men?

Ans. I suppose it was for their own accom'odation in that respect, sir.

194 Ques. Don't you know the name of that street is St. John?
Ans. No, I don't know the name of that street; I don't pay any attention to the streets much.
Ques. There is a street open right down there?
Ans. Street comes right down to the railroad where this stone wall is—tracks adjoining the stone wall.
Ques. How many had you employed in your machine and carpenter shops in 1874, about the time of this accident?
Ans. I don't know, sir.
Ques. About how many?
Ans. There may have been several hundred.
Q. What was the population of Grafton at that time, as near as you can estimate it?
Ans. I suppose some four or five thousand, sir.
Ques. And you think a town of 5,000 inhabitants hadn't any public crossing all along that road; is that a fact, that that town had no public crossing on that railroad?
Ans. There is a crossing below that bridge that crosses over the railroad, and above another one; 'way above that another one.
Ques. Did the citizens use those when they wanted to go to South Grafton?
Ans. They were compelled to go where they could pass with their teams.
195 Ques. When their wives and children and themselves wanted to go to church; aint the churches all on that side?
Ans. No, sir; some on the other side.
Ques. Majority on the north side, aint they?
Ans. Yes, sir.
Ques. On Sabbath haven't you seen people crossing to and fro over that track?
Ans. I have no doubt they did travel over that track; yes, sir.
Ques. You are still in the service of the company at this point?
Ans. Yes, sir.
Ques. It is built right up against the hill-side, North Grafton; all the streets running north and south are steep, are they not?
Ans. The most of them, sir.

LOUISA POWELL, called for defendant, sworn, testified as follows:

Direct examination by Mr. HUTCHINSON:

Ques. Where do you live, Miss Powell?
Ans. In Grafton.
Ques. Did you live there in March, 1874?
Ans. Yes, sir.
Ques. Are you the lady referred to as keeping a house there, to which Mr. Randall was brought after the accident?
Ans. Yes, sir.
196 Ques. Had you been acquainted with Randall before that?
Ans. Never seen him until Saturday night before that.
Ques. How long did he remain in the house after the accident?
Ans. Between 9 and 10 weeks.
Ques. Tell the jury if you had any conversation with him after the ac-

cident while he was at your house. If so, state when the conversation took place and what he said in regard to the accident, how it occurred.

Ans. Well, sir, he said he hadn't been on the through run for a long time, and that it was his own neglect; that he knew better than to throw that leg across the track; that was the second trip.

Ques. Well, did he say anything else in regard to it?

Ans. I have frequently heard him speak about his accident, and parties would come into the room where he was at.

Ques. Well, if he said anything further about how it occurred—why it occurred—just tell the jury; I want all that was said.

Ans. I have heard him on different occasions say he had no person to blame for his accident only himself; and, further, that the railroad company didn't ask him to work; he asked them for work; they paid
197 him for all he done; and I believe he said a dollar over they paid him. I think that is what he told his mother.

By the COURT:

Ques. Was anybody present when this conversation took place?

Ans. Always a roomful—his mother and sisters and all his relations; I don't know their names; they have heard him many times.

Cross-examined by Mr. DOVENER:

Ques. Where do you live now?

Ans. In Grafton.

Ques. Do I understand your name to be Miss Powell, or Mrs. Powell?

Ans. Miss Powell.

Ques. Have you any family?

Ans. Yes, sir; I have a very large family to look after.

Ques. Of your own children?

Ans. I have one son, sir, if you want to know it.

Ques. What business was you in in 1874?

Ans. We kept a boarding .

Ques. We?

Ans. Yes; my sisters and myself. I have two sisters.

Ques. Are they married?

Ans. No, sir.

Ques. What kind of a boarding-house?

Ans. I don't know what kind. I kept all kind' of respectable boarders.

198 Ques. I mean what do the people generally follow that board there; don't they generally run on the railroad?

Ans. Not all of them. If I can get railroad boarders I prefer them; the money is sure. I have others; I have clerks and other persons comes along and wants board; I take him.

Ques. Most all gentlemen. Do you recollect the circumstances? How did this conversation come up you have related here?

Ans. Great many times it was brought up through his mother. She wanted pay for taking care of him.

Ques. Who was she asking for pay?

Ans. She got me to ask Mr. Woodward?

Ques. Was it because she was asking for pay; was that what made Randall say it was his fault?

Ans. No.

Ques. When did you first mention this thing?

Ans. Never told anybody until Mr. Randall wrote me a letter and wanted to buy me.

Ques. Where is that letter?

Ques. That letter is destroyed. He set down and wrote a letter and told me he had a suit with the company and wanted to make a good witness out of me. If I would come he would pay me well for it.

199 Ques. That was the first time you knew he had a suit with the company?

Ans. Yes, sir.

Ques. When was that he wrote that letter?

Ans. I don't know just how long it has been.

Ques. Recollect what year it was in?

Ans. I believe he was then employed a few days at Ford's Crossing, at Wheeling. He got drunk and they discharged him; he told me that himself.

Ques. Do you recollect where this letter was dated?

Ans. At Worthington.

Ques. Do you recollect how long that was, whether 1, 2, 3, 4, 5, 8, or 10 years ago?

Ans. You must think I am a fool; the accident wasn't that long ago; I can't remember; I believe I told a confidential friend I got that letter and the contents of it.

Ques. About how long ago was it you received that letter?

Ans. It may be 2 or 3 years.

Ques. Wasn't over three?

Ans. No, sir.

Ques. Did he tell you people were trying to get him to sue the company.

Ans. Yes, sir.

Ques. In that letter?

Ans. No, sir; out of his mouth.

200 Ques. About how long before the letter was written was it he told you out of his mouth people were trying to get him to sue the company?

Ans. I can't remember.

Ques. Was it a year?

Ans. No; may be 5 or 6 months.

Ques. And the letter wasn't written 3 years ago?

Ans. I don't know; it might be 3 and it might be 2.

Ques. Don't you know this suit was brought in 1875, over 5 years ago?

Ans. The suit might have gone on a year or two.

Ques. You said he told you about 5 or 6 months before he wrote the letter.

Ans. Might have been longer and might have been shorter.

Ques. Is that as accurate as your other statements?

Ans. No, sir.

Ques. Who was that confidential friend you told about the letter?

Ans. My sister.

Ques. Did you show it to her?

Ans. Yes.

Ques. Why did you tell her about it then?
Ans. I wanted to show her what people could do.
Ques. You saw Mr. Randall after that?
Ans. Yes, sir; I never seen he had any intelligence.
Ques. Don't you know he had a summons issued for you when
201 this case was expected to be tried before and you tried to avoid being served?
Ans. No, sir; I was in Oakland.
Ques. And didn't you go to Oakland because you knew you was going to be summoned?
Ans. No, sir.
Ques. *I* did you come to find out he had a summons for you?
Ans. I found out when I got home.
Ques. Who told you that?
Ans. My niece.
Ques. Do you know a gentleman by the name of Bissard?
Ans. Yes, sir; I know a gentleman by the name of Bissett.
Ques. What does he do?
Ans. I know a great many Bissetts. He is an engineer.
Ques. On the railroad?
Ans. I suppose he is.
Ques. Now?
Ans. No; he is here now.
Ques. Is he employed by the B. & O. R. R. Co.?
Ans. I don't know whether he is or not; he don't board with me.
Ques. Knows you right well?
Ans. He has boarded there many a day.
Ques. Recollect a moment ago he and Mr. Hutchinson talking
202 together, and he went back to where you and talked to you?
Ans. Yes, sir.
Ques. Had that conversation anything to do with what you testified to?
Ans. No, sir. I asked him if he remembered; he said a great many things slipped his memory.
Ques. Was it anything about what *what* you told?
Ans. I don't know whether or not.
Ques. Why don't you know?
Ans. Him and I are well acquainted; we could sit and talk.
Ques. Wasn't you trying to get him to recollect something that would substantiate your testimony about this thing?
Ans. I asked him if he didn't remember.
Ques. What?
Ans. Of Okey Randall telling him it was his own d—n carelessness. I heard him tell it in Joe Bissett's presence.
Ques. Joe didn't remember it?
Ans. Joe says a great many things slipped his memory.
Ques. Didn't slip your memory?
Ans. No, indeed, it didn't.
Ques. Who was he speaking to at that time?
Ans. Well, indeed, I couldn't tell; whether a man by the name of Hays, or whether some of his own family, or whether it was me, or whether it was to himself.

203 Ques. Was Mrs. Randall by?

Ans. I wouldn't doubt she was; she was generally there singing. She couldn't have heard him if he said it.

Ques. You haven't any animosity against the plaintiff?

Ans. No, indeed; good feeling towards them. I treated them well and they treated me well.

Ques. And you didn't say anything to any of the boarders or to the railroad company?

Ans. Only through general talk after Oakey came and wanted me to go on Saturday night as a witness for him. I told him I didn't know anything in his favor; if I go I will be agin him.

Ques. Didn't he say he wanted you to show what he suffered?

Ans. No, sir; he said he wanted to make a good witness out of me.

Ques. Who was present?

Ans. No person only me and him, in the men's sitting-room.

Ques. Who did you first tell this to, any one else besides this confidential friend, of this?

Ans. I don't know; I may have talked about it. I am a great hand to talk when other people talk; I generally know what I am talking, though. I have had a great many wr*ight* to me that.

Ques. What was it you said he first said?

Ans. It was his own carelessness; if he had been attending to
204 his business it wouldn't have happened.

Ques. Is that the language he used?

Ans. That's about as near as I can come to it.

Ques. While ago you say he said it was his own fault, and threw his leg across it?

Ans. That was at other times.

Ques. Did he make expressions so frequently that you can't give the exact language on those occasions?

Ans. Yes, sir. You know when there's a man hurt there's dozens and dozens coming in and asking about it and how it happened?

Ques. Can you mention any person here who heard him make use of those expressions?

Ans. I don't know any one here.

Ques. Any person here who was boarding at your house?

Ans. Joe Bissett was; and let me tell you there was 14 of my boarders left after he came there, but I took him. I wouldn't throw out a dog if he was hurt.

Ques. When was you summoned for the R. R. Co. in this case?

Ans. Well, I don't know just what day it was. I came here yesterday. On Tuesday was the 2d?

Ques. I believe so.

Ans. Well, it was the second.

Ques. Monday was the second.

Ans. That's the time I was summoned.

Ques. Who summoned you?

205 Ans. I don't know who you call it.

Ques. The marshal?

Ans. I suppose I got it lawful.

Ques. Do you know the man that handed it to you?

Ans. Yes, sir.
Ques. Who was it?
Ans. Mr. Hamilton sent it to me.
Ques. Did you tell him you wouldn't go?
Ans. I told him I didn't like to go, but if I had to I would.
Ques. Did you tell Mr. Randall that when he wanted you?
Ans. I told him I wouldn't; I didn't know anything in favor of the man.
Ques. And you knew something in favor of the R. R. Co., and therefore you was willing to go?
Ans. Yes; I always wanted to tell the truth.

Defendant rests.

SARAH RANDALL recalled for plaintiff in rebuttal.

Direct examination by Mr. DOVENER:

Ques. How old are you?
Ans. I am 64 in August.
Ques. You heard the statement of Miss Powell?
Ans. Yes, sir.
206 Ques. Just tell the jury whether such language as that was ever used by your son in your presence at any time?
Ans. Indeed it never was at any time in my presence.
Ques. Was you present with your son most of the time?
Ans. I was there all the time; I wasn't out.
Ques. How is your hearing?
Ans. My hearing is very well.
Ques. Did you hear her what she said?
Ans. I did.

OKEY RANDALL, plaintiff, recalled in rebuttal.

Direct examination by Mr. DOVENER:

Ques. Just state whether or not you used any such language as detailed by Miss Powell, in her presence, or any one else's, or to any one at any time during your sickness?
Ans. I never did, sir.
Ques. Or in substance, as she has repeated it?
Ans. I never did; after I went home I wrote to Miss Powell and thanked her kindly for how she had treated me.
Ques. Tell what took place between Miss Powell and you last Saturday evening?
Ans. I had a summons, and went to the house and told Miss Powell I had a summons. Says she, "I won't do it, Okey. I don't know nothing that would do you any good. I don't know nothing that would
207 benefit the railroad." Then I said, "Miss Powell, if you don't know anything, I will not bother you."
Ques. Was there anything said, it wouldn't do you any good for her to come here; what she did know was in favor of the railroad company?
Ans. No, sir; she never said that, to the best of my recollection.
Ques. Did you go into the company's service subsequent to your injury at Handlon's crossing, at Wheeling?

Ans. I never did.

Ques. Did you ever tell that lady you did and was discharged on account of drunkenness?

Ans. No, sir.

Ques. Was such the fact?

Ans. It was not.

Cross-examination by Mr. HUTCHINSON:

Ques. Did you get drunk?

Ans. No, sir.

Ques. Do you know a man out in that county by the name of Charles Martin?

Ans. I do.

Ques. What relation is he to you?

Ans. He is no relation to me. I don't reckon he is; if he is, it is such a little it wouldn't be looked at, or, in fact wouldn't recognize it.

By Mr. DOVENER. I believe your fathers are said to be third cousins, are they not?

By the COURT. Stand aside.

208 CHARLES MARTIN recalled for the plaintiff in rebuttal.

Direct examination by Mr. DOVENER:

Ques. On yesterday, or day before, did you have any conversation with Bud Jasper, about a trip to the railroad office to find out who this engineer was, at the boarding-house in this city. Did you have a conversation?

Ans. Yes, sir.

Ques. State what that conversation was?

Ans. I was talking to Mr. Jasper about the accident that night, and he pretended, or at least he didn't know much about it, and says I, it was 329 engine and Tayler Groves was running it that ran over him, and he nodded his head and said (the witness made a sound with his mouth closed indicating an assent).

Ques. State whether or not you asked him whether or not he recollected going to the railroad office with you to ascertain who was on that engine, and the number of it.

Ans. I don't know that I asked him; we was talking about going.

Ques. What did he say, whether he went or not?

Ans. I don't recollect what he said about going; we was talking about going there together.

Ques. You don't recollect what he said about it?

Ans. Not particularly; we was talking.

Ques. Did he say to you he didn't go?

209 Ans. No, sir.

Cross-examination by Mr. HUTCHINSON:

Ques. Did he say that he did, as you recollect?

Ans. I don't recollect that he just came out with that language and said that he did.

(Mr. Dovener offered to prove on behalf of plaintiff by witness Martin what the witness Jasper said about this switch being a dangerous place;

which offer was denied by the court and exception taken thereto by plaintiff.)

Plaintiff resists.

In the United States circuit court for the district of West Virginia.

OKEY RANDALL
vs.
THE B. & O. R. R. Co. } In case.

STATE OF WEST VIRGINIA,
Ohio County, to wit:

I, Alfred Rheinstrom, a stenographer, do certify that the foregoing testimony is a true report of the evidence taken by me in said case, in the circuit court of the United States, for the district of West Virginia, on February 3d and 4th, 1880, said testimony being all the testimony in said case, both for plaintiff and defendant.

ALFRED RHEINSTROM.

210 Taken, sworn and subscribed to before me this 9th day of February, A. D. 1880.

H. B. FERGUSON,
Notary Public in and for Ohio County, W. Va.

And evidence having been given as aforesaid, and after the evidence had been closed and before the jury retired, or the cause had been argued to the jury, the plaintiff by his counsel moved the court to give to the jury the following instructions, and each of them:

1st. The jury are instructed that when the servant of a railroad company receives an injury, occasioned in part by the negligence of his master and in part by that of a fellow-servant, without contributory negligence, he can maintain an action against such railroad company for such injury, and the contributory negligence must be that of the party injured to prevent a recovery.

2d. The burden of proff is upon the employee to show to the satisfaction of the jury both the negligence of the company and his own care, but he is not bound to do more than raise a reasonable presumption of negligence on the part of the company.

3d. An employee of a railroad company only engages to incur the
211 ordinary risks incident to his employment. (All men are presumed to know the law.) By the law of this State in force on the 22d day of March, 1874, it was the duty of the defendant to have its locomotive engines equipped with a bell or steam-whistle, to be sounded, or the said bell to be rung continuously, either by the engineer in charge of said engine or fireman thereon, when said engine was approaching a public street or highway where said railroad crosses said public street or highway, from the time said engine was at least sixty rods from said public street or highway until it had passed the same. And any risks or danger to said employee caused by reason of the defendant not having an engine properly equipped at that time with a bell or steam-whistle, and the failure of the engineer or fireman to blow said steam-whistle or ring said bell when ap-

proaching a highway or crossing as aforesaid, as provided by law, by reason of the failure of said railroad company to so equip said engine, is not within the ordinary risk assumed by an employee, and if he receives any injury by reason thereof he is entitled to recover damages for the injuries he has so received.

4th. If the jury believe from the evidence that the plaintiff was injured at a point on said defendant's railroad within sixty rods of any
212 public street or highway, where said railroad crosses said public street or highway, by engine number 329, belonging to the defendant, in charge of Tayler Groves, as engineer (who was at the time in the employ of the defendant as such engineer and operating such engine), by reason of the failure of said engineer to blow a steam-whistle on said engine or ring a bell and continue to ring said bell or blow said whistle until said public street or highway was passed, they shall find for the plaintiff.

5th. A master is liable to his servant for injuries resulting from a patent defect, either in the manner of construction or in the placing of machinery or implements to be used by such servant, if said servant had no knowledge, and could not in the exercise of ordinary care have known of the defective construction, or placing of such machinery or implements, although the negligence of a fellow servant contributed to the accident.

6th. The implied undertaking of employees in the same general service to risk the contingencies which the ordinary skill and care of each other in his line of service could not avert, does not exonerate the company from liability for damages resulting to one of such employees from the extraordinary or gross negligence of another employee.

213 7th. The defendant is bound to use all the appliances for safety necessary for the business in which his servant is engaged that would ordinarily be used in such business, at the point where such accident occurred, having regard to the point at which they are to be used, as well as the risk to life and limb of his servant in the use of the appliances.

8th. The jury are instructed that a master is liable to a servant for an injury occasioned by defective machinery and implements furnished to the latter to operate, if there was negligence in providing such machinery or implements, and knowing of the defect the master omitted to warn the servant of its existance.

9th. It is the duty of railroad companies to provide their employees with such appliances as are reasonably necessary and calculated to insure the safety of their employees in the business they are employed.

10th. The jury are instructed that a railroad company must use ordinary care in the selection of servants competent for the business for which they are engaged, as well as the selection of implements, machinery, and appliances to be used by its servants in their employment. Such ordinary care must be measured by the character, risk, exposure, and hazard of
214 the life and limb of his coservants as well as the risks and dangers incident to the use of the appliances and machinery furnished by the company to be used by the servants in their employment, and the degree of care is high where life or limb is likely to be in danger by reason of defective implements or appliances or the employment of incompetent servants.

11th. The jury are instructed that if they find from the evidence that

at the time plaintiff rece'ved the injury complained of in the declaration he was in the exercise of ordinary care in and about the service he was at the time engaged in, and that the defendant was negligent, in furnishing defective implements or machinery to be used by the plaintiff in the business in which he was engaged as their servant, the plaintiff is entitled to recover, if they further find that the negligence of the defendant was the proximate cause of the injury complained of, although said negligence was not the sole or im'ediate cause.

12th. If the jury find from the evidence that the switch and switch-ball were placed by the defendant at the point between defendant's tracks at which the plaintiff received the injury complained of in the declaration (taking all the evidence into consideration), and was so constructed
215 as to make its use at that point, and in the position it was placed, by the defendant dangerous, and more than ordinarily hazardous to employees operating said switch, and the defendant's agents, whose duty it was to place and have the same equip'ed and constructed, knew, or must from the evidence disclosed have known, that the placing of a switch of that character and lever for working the same in the position in which it was placed and at the point so placed would increase the danger and hazard of a brakeman in switching the cars and engines of the defendant at that point, so as to make the risk of loss of life or limb more than ordinarily hazardous, and after such knowledge continued the use of such switch and lever so constructed and placed, and that the plaintiff, being ignorant of the danger and hazard so shown by the evidence, was directed by a servant of the defendant who had authority over him in his employment to open said switch, and while endeavoring to execute said order he used and exercised ordinary care and prudence, and while so engaged he received the injuries complained of in the declaration, the plaintiff is entitled to recover.

13. The jury are instructed that it is unlawful for the defendants to run or operate their trains and locomotive engines at a high
216 and dangerous rate of speed within the corporate limits of any incorporated town, and the plaintiff is entitled to recover all damages sustained by him by reason thereof, provided the plaintiff in his employment was not engaged in any manner in assisting and operating a train or engine of defendant while running at a high and dangerous rate of speed as aforesaid, and is otherwise free from fault or negligence on his part.

14th. If the jury believe from the evidence that the plaintiff was injured at a point on said defendant's railroad within sixty rods of any public street or highway, and said public street or highway was crossed by said railroad by locomotive engine number 329 belonging to defendant in charge of Tayler Groves as engineer (who was at the time in the employ of the defendant as such engineer) by reason of the failure of said engineer to blow a steam-whistle on said engine or ring an bell and continue to ring said bell or blow said steam-whistle until said public highway or street was passed by said engine, they shall find for the plaintiff in such sum as the jury in *the jury in* the exercise of a sound discretion, taking all the evidence into consideration, find to be a just compensation for the injuries actually sustained by the said plaintiff.

217 15th. The jury are instructed that a railroad company whose switches are so constructed and placed as to expose an employee using the same in the course of his employment to a latent danger is liable to such employees as are injured thereby. If the jury find from all the

evidence in the cause that such company, through its superior officer, having full control in regard to the construction thereof, knew or must have known of the latent danger to which said employees was liable and exposed by reason thereof is liable to such employees as are injured thereby, and if such danger is not obvious it is the duty of such company to warn those who incur such danger by reason of its existance.

16th. The jury are instructed that if they find for the plaintiff they may in a sound discretion award him all damages which the evidence shows him to have sustained by reason of the injury complained of, and in estimating the same they may consider the expense incurred by him in and about his cure, the value of the time lost by him, the character of the injury, whether permanent or not, and what would be a fair compensation for any pain or suffering he may have endured, either in body or mind, caused by the injury, as well as any permanent reduction of his
218 power to earn money.

17. The jury are instructed that if they find from the evidence that at the time plaintiff received the injury complained of in the declaration he was in the exercise of ordinary care in and about the service he was at that time engaged in, and that the defendant was negligent in not furnishing and placing a light on the tender when said tender is being pushed by an engine in front of said *engine* the plaintiff is entitled to recover, if they further find that the negligence of the defendant in not so placing a light or signal in the night time, and without any contributory negligence upon the part of the *defendant*.

But the defendant, by its counsel, objected to the court giving to the jury the said instructions, and each of them.

But the court overruled the defendant's objection as to the first, second, and sixteenth requests of the plaintiff, and gave said instructions to the jury, and sustained the defendant's objections to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and seventeenth requests, on behalf of the plaintiff and each of them, and refused to give them or either of them to the jury as requested by the plaintiff.

219 And thereupon the defendant moved the court to instruct the jury as follows:

That the plaintiff, being required to make out his case as alleged in his declaration, and the evidence being such that if a verdict should be found for the plaintiff the court would be compelled to set it aside, the jury are instructed to find a verdict for the defendant.

And the plaintiff, by his counsel, then and there excepted to the several refusals to grant the respective instructions numbered 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 17th, and each of them, as prayed for by the plaintiff, and further excepted to the instructions given the jury as prayed for on behalf of the defendant, and especially to that part thereof in the words following: "And the evidence being such, if a verdict should be found for the plaintiff the court would be compelled to set it aside, the jury are instructed to find a verdict for the defendant," and then and there tendered this bill of exceptions, praying that the same may be signed and sealed by the judge and made a part of the record in this cause, which is accordingly done.

J. J. JACKSON. [SEAL.]

And on another day, to wit, on the 28th day of February, 1880, the following order was ma le and entered of record, to wit:

220 OAKEY RANDALL
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In case.

This day came the parties by their attorneys, and thereupon it is considered by the court that the plaintiff take nothing by his bill, and that the defendant recover against the plaintiff its costs by it about its defense in this behalf expended.

And the plaintiff conceiving himself ag'rieved by the judgement of the court this day entered against him in the said cause, upon motion of the plaintiff a writ of error is granted him to the Supreme Court of the United States, to act as a supersedaes, and that a transcript of the record and proceedings in this cause, duly authenticated, be sent to the Supreme Court of the United States upon his giving bond with good security, conditioned and approved according to law, in the penalty of five hundred dollars, within sixty days from this date.

The writ of error mentioned in the foregoing order is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

221 The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said circuit court before you between Oaky Randall, plaintiff; and the Baltimore and Ohio Railroad Company, defendant, a manifest error hath happened to the great damage of the said Oakey Randall, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this 19th day of April, in the year of our Lord one thousand eight hundred and eighty.

222 [SEAL.] L. B. DELLICKER,
Clerk of the Circuit Court of the United States for the District of West Virginia.

(Endorsed:) Filed in office this 19th day of April, 1880. L. B. Dellicker, clerk.

And on the same date, to wit, on the 19th day of April, 1880, a bond was filed in the clerk's office of the circuit court of the United States for the district of West Virginia, which bond is in words and figures following, to wit:

Know all men by these presents that we, Oakey Randall and S. W. Sturm and Norman J. Randall, are held and firmly bound unto the Baltimore and Ohio Railroad Company in the full and just sum of five hundred dollars, to be paid to the said The Baltimore and Ohio Railroad Company, its certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of April, in the year of our Lord one thousand eight hundred and eighty.

223 Whereas lately at a circuit court of the United States for the district of West Virginia, in a suit depending in said court, between Oakey Randall, plaintiff, and the Baltimore and Ohio Railroad Company is defendant, a judgement was rendered against the said Oakey Randall, and the said Oakey Randall having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgement in the aforesaid suit, and a citation directed to the said The Baltimore and Ohio Railroad Company, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Oakey Randall shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

OAKEY RANDALL. [SEAL.]
S. W. STURM. [SEAL.]
NORMAN J. RANDALL. [SEAL.]

Sealed and delivered in presence of—
THOS. F. CONAWAY, *U. S. Com'r.*
CLARENCE L. SMITH.
B. B. DOVENER.

Approved by—

J. J. JACKSON,
Judge Dist. C. U. S., D. W. Va.

APRIL 17, 1880.

224 Appended to the foregoing bond is the following certificate, to wit:

UNITED STATES OF AMERICA,
Judicial Circuit, District of West Virginia:

I, Thomas F. Conaway, commissioner in and for the United States courts in the district of West Virginia, do hereby certify that S. W. Sturm and Norman J. Randall, both citizens of the county of Marion and State of West Virginia, and owners of real estate in said county, this day personally appeared before me, and, being duly sworn as to their suffic'ency as sureties upon the hereunto attached, dated the 10th day of April, 1880, for a writ of error in the case of Oakey Randall vs. The Baltimore

and Ohio Railroad Company, depending in the circuit court of the United States for the district of West Virginia, the said S. W. Sturm made oath that he was worth the sum of four thousand dollars after the payment of his debts and liabilities and what he is surety for others, and the said Norman J. Randall made oath that he was worth the sum of two thousand dollars after the payment of his debts and liabilities and what he is surety for others. I further certify that I am well acquainted with said parties, and saw them sign and seal the annexed bond, and
225 witnessed the signing and sealing of the same by the said Oakey Randall, and in my opinion the sureties upon said bond are good and sufficient sureties in the sum in which they have qualified, being the owners of real estate valued at $5,000.00 in the said county of Marion.

In witness whereof I have hereunto set my hand and official seal this tenth day of April, 1880.

THOMAS F. CONWAY, [SEAL.]
United States Commissioner.

And on the same day, to wit, on the 19th day of April, 1880, a citation, directed to the Baltimore and Ohio Railroad Company was issued, in words and figures following, to wit:

The United States of America to the Baltimore and Ohio Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein Oakey Randall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgement
226 rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States of America, this 19th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] L. B. DELLICKER,
Clerk C. C. U. S., D. of W. Va.

(Endorsement:)

Executed the within citation by handing an office copy of the same to John Adair, agent of the B. & O. R. R. Co., at Parkersburg, W. Va., on the 21st day of April, 1880.

G. B. GIBBINS,
Dep'y for Geo. W. Patten, U. S. M. D. W. Va.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing is a true transcript of the record in the case of Oakey Randall vs. The Baltimore and Ohio Railroad Co., from the records and files of my office.

In testimony whereof I hereunto set my hand and the seal of said court at Parkersburg, in said district, this 16th day of September, 1880.

[SEAL.] L. B. DELLICKER,
Clerk C. C. U. S., D. of W. Va.

Cost of record, $75.00.

(Indorsement on cover:) No. 128. Oakey Randall, plaintiff in error, vs. The Baltimore and Ohio Railroad Company. West Virginia C. C. U. S. Filed 16th October, 1880.

109-478

FILED
NOV 15 1883
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 128.

OAKEY RANDALL, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the District of West Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action for damages by a servant against a master, a railroad company, for an injury received and damages occasioned without any fault upon the part of the servant, but which was occasioned on account of and by reason of the gross negligence of the defendant in error in employing persons not of due skill and competent as his superiors, and under whose direction he was to act, and in not equipping their engines with bells, and sounding a steam whistle or ringing a bell at a distance of sixty rods from a public crossing or highway, as required by the statutes in the State of West Virginia, in force at the time of the accident. On the 22d day of March, 1874, Oakey Randall, the plaintiff in error,

was employed by the defendant in error as a brakeman upon its line of road, on the date aforesaid, about nine o'clock p. m., it being a dark night, in the town of Grafton, West Virginia, he was directed by the conductor of the train upon which he was engaged to open a peculiarly constructed switch, called a ground switch, in order to switch the train or some cars upon another track, and which was so improperly constructed that it became necessary to stoop in a recumbent position and throw a portion of his body over an adjoining track running parallel to the one on which the said switch ball was situated, in order to open the same, and exposed the person of the party opening the switch to great peril from any engine or train that might pass on the track so running parallel with the track to be open by said switch ball, and which track was in close proximity, —— feet of each other.

The night was dark. The employee knew nothing of the situation of affairs at this point, or the danger, not having been there before; the conductor did, but failed to notify him; nor did the defendant or any of its agents or servants instruct him further than to tell him where to find the switch-ball. The switch was considered dangerous by those experienced and skilled as railroad men, and competent to judge. A switch used by said company, and of different construction, could have been used for the same purpose with longer bar, and to the far side of the track, and with the same facility, and perfectly safe, and free from the dangers incident to the use of this one. While so engaged an engine, with a tender attached behind it, belonging to the defendant, in no way connected with the train on which plaintiff in error was employed, in charge

of and under the control of an engineer, the agent and servant of the defendant, backed down the track, which ran alongside of where the plaintiff in error was engaged in unlocking said switch, and on the track near which plaintiff's body was necessarily thrown in unlocking the switch. The engine had no light on the tender, nor was there any person on the rear of the tender, which was the end approaching plaintiff, to give notice to the plaintiff or the engineer of said engine of any danger. Said engine and tender was backing at the rate of ten to twelve miles per hour. The point on the track where the accident happened was about the center of the town of Grafton; was in less than sixty rods of where public streets, highways, and crossings cross the said track of defendant, on which said engine and tender was approaching. At the time of the accident there was great noise occasioned by the movements of defendant's engines and cars at another point, within hearing of plaintiff, on another branch of said road connecting at Grafton, but the engine and tender could not be heard, owing to this noise, nor seen on account of the darkness. That the engineer, nor did any one else on or off said engine or tender, give any notice of the approach of said engine and tender, nor was there any bell rung thereon, or whistle sounded. That said engine, which was engine No. 329, was not at the time equipped with a bell, as required by law.

That the defendant was a careful and diligent man in and about the business he was then engaged in performing for the defendant; that the engine and tender, which was wider than the track, backed upon his body so exposed, and crushed and cut off his left leg; that he suffered great bodily pain; was forced to, and did, lay

out large sums of money in and about his cure, &c. That being the main facts proven, the court was asked to give the jury, on behalf of the plaintiff, seventeen instructions, numbered from one to seventeen, and found upon pages 96, 97, 98, and 99 of the printed record, but the court refused to give the instructions marked Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 17, respectively, to which plaintiff excepted, (see printed record, pages 96, 97, 98, and 99,) but did give the jury, on behalf of the plaintiff, the instructions marked 1, 2, and 16, respectively. (See printed record, page 99.) The court, upon the request of the defendant, and notwithstanding an objection thereto by plaintiff, instructed the jury as follows:

"That the plaintiff being required to make out his case as alleged in his declaration, and the evidence being such that if a verdict should be found for the plaintiff the court would be compelled to set it aside, the jury are instructed to find a verdict for the defendant," to which actions of the court, and each of them, plaintiff excepted.

See printed record, page 99.

The plaintiff relies upon the following assignment of error:

I. The court erred in not giving instruction No. 3, as asked by the plaintiff, the laws of the State of West Virginia in force at that time and at the time of the accident, gave *any person*, be they an employee or not, who might be injured, and sustain damages by reason of the company failing to comply with the statute, a right of action, and as to an injury received by reason of such neglect, the law of master and servant had no application. (See Acts of Legislature of West Virginia, 1873, chap. 88.)

"SEC. 31. A bell or steam whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling until such street or highway is reached, * * * and the corporation owning the railroad shall be liable to any person injured for all damages sustained by reason of such neglect." * * *

That there was evidence on which to base this instruction; the evidence was:

That no whistle was blown, (p. 15), that it was about fifty yards above a bridge, across the track, (p. 16), that it was about the center of the town of Grafton; that just opposite the place of the accident there was a street and alley; that it was a public crossing (p. 17); it was sixty or seventy yards above a crossing across the railroad (p. 34); that Grafton was an incorporated town (p. 38); that there was a crossing sixty or seventy yards above this bridge, and just at point of accident (pp. 38, 39, 40, 62, 68, 69, 70); and the plaintiff was injured only 30 or 40 feet from crossing (p. 41). There was no bell on the engine, No. 329, that run over plaintiff (p. 57). There is an alley about one hundred feet west of place of accident (pp. 79, 80); about nine hundred feet west of accident a public crossing for wagons (p. 80), and with in town of Grafton above where accident happened, a public crossing (p. 81). Grafton has an population of about 5,000, and a crossing above and below (p. 89). There was no light on tender or lookout.

This defendant company was running and operating their road under this statute quoted above, see sec. 37 of same chapter, acts 1873, acts Leg. W. Va.:

"SEC. 37. All existing railroad corporations within this State shall respectively have and possess all the powers and privileges, and be subject to all the duties and liabilities and provisions contained in this act." * * *

The court erred in not giving instruction No. 4 asked for by the plaintiff in error, and found on page 97 of printed record, for the reasons that the evidence disclosed by the record, a portion of which has been referred to, made it proper. The engine which passed over defendant was No. 329, and Taylor Groves was in charge. (See pp. 43–4.)

The court erred in refusing under the evidence disclosed by the record to give instruction No. 5, p. 97, asked by plaintiff.

The court erred in refusing to instruct the jury as asked in plaintiff's 6th instruction, found on page 97 of record.

The court should have given the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 17th instructions asked by plaintiff, found on pages 97, 98, and 99 of record.

See Hough *vs.* Railway Co., 100 U. S. S. C., 213.
Chamberlain *vs.* M. & M. R. Co., 11 Wis., ~~288.~~ 248
Haynes *vs.* East Tenn. & Ga. R. R. Co., 3 Coldwell, 222.
N. O. Jackson G. N. R. Co. *vs.* Allbritton, 38 Miss., 242.
Palmer *vs.* Erie R. R. Co., 5 Vroom, 151.
Nashville R. R. Co. *vs.* Elliot, 1st Cold., (Tenn.,) 612.
Wood on Master and Servant., sec. 357.
Wharton on the Law of Negligence, secs. 211, 212, and 232*a*.
Railroad Co. *vs.* Fort, 17 Wall., 557.
Ford *vs.* Fitchburg R. R. Co., 110 Mass., 241.

It was also in error in the court to give the instruction asked for by the defendant, instructing them to find a verdict for the defendant. (See page 99 of printed record.)

There was a conflict of testimony upon many different points, upon which, if the jury found the facts to be in favor of plaintiff, entitled him to their verdict, both under the statute and the common law. The defendant recognized this fact and went fully into the defense. It cannot, I submit, be said, if all the facts set forth in the testimony be true, that the verdict should be for the defendant. The case does not come under the case of Bevens *vs.* U. S., 13 Wall., 56, or any subsequent case deciding or passing upon the right of the court to take the case from the jury. The court in this case had no right to pass upon the facts, this was the province of the jury.

The judgment should be reversed.

B. D. Dovener,
For Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
NOV 15 1883
JAMES H. McKENNEY, Clerk.

104-478

SUPREME COURT
OF THE
UNITED STATES.

:o:

No. 128. October Term.

:o:

OKEY RANDALL, PLAINTIFF IN ERROR,

versus

BALTIMORE & OHIO RAILROAD COMPANY.

:o:

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

SUPREME COURT

OF THE

UNITED STATES.

No. 128. October Term.

OKEY RANDALL, Plaintiff in Error,

versus

BALTIMORE & OHIO RAILROAD COMPANY.

Brief of Counsel for Defendant in Error.

This is an action on the case by a servant against a master to secure damages for an injury whilst in the employment of the master resulting from carelessness arising from defective machinery, unskillful servants, and disregard of the statute law of the State regulating signals.

The cause of action is set forth in *seven* separate counts in an amended declaration.

The *first count* complains that the defendant failed to in a proper manner, "*construct their tracks at the town of Grafton*" so that "*it was impossible*" for him to perform with safety the work which the defendant required of him.

The *second count* complains that the defendant neglected to "so construct their switches" as to prevent accidents, but so negligently did it as to make it "impossible to perform" the service required of the plaintiff by the defendant.

The *third count* is that the defendant neglected its duty in not equipping its engines "*with bells and signals*" so as to prevent accident, and was so negligent in that respect that "it was impossible to perform the service" of "switching a train" safely.

The *fourth count* complains that the defendant so negligently constructed "*a switch ball*" used to open and close a switch that it "was impossible to perform the service" safely which the defendant required of the plaintiff.

The *fifth count* complains that *Taylor Groves* another servant of the defendant "was unskillful, *negligent and totally unfit*" to perform the business of running an engine, and so known by the defendant, propelled an engine over him.

The *sixth count* complains that his fellow servant *Taylor Groves* was unskillful and totally unfit for the employment he was engaged in did "without sounding a whistle or ringing a bell or other signal within sixty rods from a public crossing as required by law of the State of W. Va., propel a locomotive upon him.

The *seventh count* is substantially as the sixth count complaining of the act of an unskillful fellow servant.

The general issue was pleaded, a jury impannelled, and a trial had before them, and a verdict and judgment for the defendant.

Instructions numbering from one to seventeen inclusive was prayed by the plaintiff and objected to by the defendant, and the objections, to all except the *first, second* and *sixteenth*, were sustained. As to the latter they were overruled and the instructions were given.

The defendant asked for one instruction, whether objected to, or whether given, does not appear.

POINTS.

First.—There was no error in refusing either of the prayers 3, 4, 5, 6,7, 8, 9, 10, 11, 12, 13, 14, 15 and 17.

The *third* was a pure abstraction, for there was no proof among that which is found in the record which tends to show that the engines in question were not equipped with a bell *or whistle*, nor that an engine "was approaching a public street or highway where the railroad crosses it."

The *fourth* was equally objectionable, for there was no proof tending to show that the plaintiff was injured within sixty rods of a crossing by the railroad, with a public street or highway.

The *fifth* is an abstraction, simple and pure, and bears no relation to the proof in the case.

The *sixth* is liable to the same objection as the fifth.

The *seventh*, *eighth*, *ninth* and *tenth* are like the last.

The *eleventh* is not only liable to the same objection, but there was no proof whatever that there was any defective implements or machinery used by the plaintiff. Besides the plaintiff could not recover except for such defect as he relied upon and set out in his declaration, and that his injury resulted therefrom.

Hawker vs. B. & O. R. R. Co., 15 W. Va., p. 628.

The *twelfth* is liable to the objection of asking the jury to be told that the plaintiff may recover because he is required to incur a risk "*more than ordinarily hazardous*," instead of for the cause complained of in the declaration.

There was no proof that the risk to life or limb was more than ordinarily hazardous because of the place where the switch was placed. It is not enough that it was in a dangerous place, or that it was unsafe for that reason, for this may be said of many places where switches are unavoidable. The safety of the passengers and trains requires that

the train men should be in more dangerous places than the passengers. And they are at certain times and places in more danger than at others, and this cannot be avoided.

The *thirteenth* grounds the plaintiff's right to recover upon a fact neither alleged nor proved in the case.

The *fourteenth* asks for a verdict upon the ground that the plaintiff was *injured* within 60 rods from a point where the railroad *crossed* a public street or highway, and because Taylor Groves, as engineer, failed to ring a bell or blow a whistle continuously until the street or highway was passed, without evidence tending to prove that a street or highway crossing was within 60 rods or any other distance from the place of injury, or that the engine was approaching one.

The *fifteenth* has no relevancy to the facts alleged or proved.

The *seventeenth* asks a verdict because a light was not placed on the tender which ran over the plaintiff. No such thing is complained of in the declaration, but that Taylor Groves, the Co. servant who carelessly ran over him, was unskillful and unfit for the discharge of the business, and was known by the defendant to be so, but of which there was no proof.

There was some proof that the switch at the place in question was dangerous, but not from any defect in its structure or the manner of operating it, but because of the place where it was situated. Indeed, no place on a train can be said to be entirely free from danger, and at some times and some places on every road switches or curves are more so than at others, and this is unavoidable.

It appears from the uncontradicted evidence that the switch in question for a long time before the accident and up to the trial had been at the same place and in the same condition and safely used by the defendant and without accident; and further, that no other kind of a switch known to the service would have been as safe at that place.

There was no proof that the switch could not have been used with safety by a careful man, except when two trains were passing at the *same time*. On the occasion in question there was no proof that two trains were passing at the same time. If even there had been, it would have been gross carelessness in the plaintiff to have attempted to use it then, for it would have been impossible for him, if attentive, not to have known of such passage.

His own train had stopped and was waiting for him to change the switch and to signal it to move.

Second.—The record contains but one bill of exceptions, which is to the judgment of the court for refusing to give the *fourteen* instructions named, and for giving *one* instruction asked for by the defendant, and especially to that part of it in these words: "And the evidence being such if a verdict should be found for the plaintiff the court would be bound to set it aside; the jury are instructed to find a verdict for the defendant."

That if such an instruction had been given in this case there would have been no error, because, 1st, the bill of exception does not contain *all* the evidence given to the jury, so that the court could see whether a verdict for the plaintiff should or should not have been set aside, had one been found thereon. 2d, because even upon so much of the evidence as is found in the record a verdict for the plaintiff should have been set aside, because the proof was insufficient to authorize such an one.

The plaintiff in error must show affirmatively by the *record* any error complained of, and nothing else is allowed to disturb the judgment below.

In this case the record fails to show that the instruction asked for by the defendant was given to the jury, and a court of error cannot *infer* it was. Neither if it had been given without objection, could it be afterward excepted to.

No instruction given by the court to the jury upon the effect of the *whole evidence* can be reviewed by the appel-

late court, unless the record discloses the *whole evidence.* The record does not do so in this case.

The certificate and affidavit of the reporter, made several days after the verdict, cannot properly be substituted for the distinct judgment or certificate of that fact by the judge of the court. The judge makes no such statement in his bill of exceptions, and an examination of what the reporter Reinstrom certifies as the whole evidence discloses that other evidence was given to the jury, and which is not embraced therein.

From the reporter's notes, which are referred to in the bill of exceptions, it will appear that the act of incorporation of the town of Grafton given to the jury and the map "A" referred to is not found in the record; they further show that much of the evidence shown to the jury consisted of *motions* and *actions*, used in explanation of the manner of operating the switch in question, none of which are stated or explained in the record, and without which the words used by the witnesses are meaningless.

The witnesses were allowed to use illustrations, not by words or speech, to the jury. which are not in any form given in the record, so as to effectually prevent this court from correctly estimating the weight and effect of the evidence before the jury.

Third—If the jury had been instructed as requested by the defendant they were properly instructed.

Griggs vs. Houston 104 U. S. 553.

Herbert vs. Butler 97 U. S. 319.

Pleasant vs. Fant 22 Wall 116.

Fourth—There being nothing in the record to show that the instruction which was asked for by the defendant and referred to in this bill of exceptions was *given*, and *objected* to and the record failing to show all the evidence given to the jury, and it appearing from the record page 12 (printed)

that three bills of exception were taken upon the trial, it is presumed that this bill was intended to present for review the action of the court in refusing to give the instructions set forth in it. For this purpose it was improper to set forth the evidence *in mass* rather than the *facts* which it tended to prove as required by the rules of the this court.

Lincoln vs. Claflin 7 Wall. 136.

Fifth—If it would have been proper for the court to instruct the jury upon the whole evidence to find the issue for the defendant, it could not have been error to the prejudice of the plaintiff to refuse to give for him any or all the instructions asked for by him and in support of the judgment of the court it may be fairly inferred that such an instruction was given without objection and that the whole evidence did justify it.

Sixth—The plaintiff has pled no errors upon which he will rely upon the hearing of this case.

C. BOGGESS,

COUNSEL FOR DEFENDANT IN ERROR.

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